SUP

THE NATIONAL BANK OF

PETITION FOR CERTIORARI FILED
CERTIORARI AND BRIEF

(16,696)

# (16,695.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1898.

No. 182.

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GEORGE L. WHITMAN, PETITIONER,

*vs.*

THE NATIONAL BANK OF OXFORD.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1898.

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a United States Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
*vs.*
NATIONAL BANK OF OXFORD, Defendant in Error.

*Transcript of Record.*

Error to the circuit court of the United States for the southern district of New York.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The National Bank of Oxford, plaintiff, and George L. Whitman, defendant, a manifest error hath happened, to the great damage of the said George L. Whitman, defendant, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the second day of January, 1897, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-
2 six, and of the Independence of the United States the one hundred and twenty-first.

JOHN A. SHIELDS,
*Clerk of the Circuit Court of the United*
[L. S.] *States of America for the Southern District*
*of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
*U. S. Circuit Judge.*

UNITED STATES OF AMERICA, } ss:
*Southern District of New York,* }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to ninety-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George L. Whitman, plaintiff in error, against National Bank of Oxford, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 30th day of December, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) Diary. The U. S. circuit court of appeals for the second circuit. George L. Whitman, plaintiff in error, *vs.* National Bank of Oxford, defendant in error. Writ of error. Wilson & Wallis, attorneys for plaintiff in error, 48 Wall St., N. Y. city.

3 Due service of a copy of the within writ of error is hereby admitted this 8th day of December, 1896. Hornblower, Byrne & Taylor, attorneys for defendant in error.

United States Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD }
*against* }
GEORGE L. WHITMAN. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 29th day of May, in the year one thousand eight hundred and ninety-five.

[L. S.] JOHN A. SHIELDS, *Clerk.*
HORNBLOWER, BYRNE & TAYLOR,
*Plaintiff's Attorneys.*

Office and post-office address, 45 William street, New York city.

4 Supreme Court, County of New York.

THE NATIONAL BANK OF OXFORD
*against*
GEORGE L. WHITMAN.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin Haywood Adams, being duly sworn, says: That he is in the office of Hornblower, Byrne & Taylor, plaintiff's attorneys herein; that on the 29th day of May, 1895, he served on George L. Whitman, the defendant above named, at his place of business, No. 40 Leonard street, New York city, the within summons, by delivering a copy thereof to him personally, and leaving the same with him. Deponent further says that he knows the person so served to be the person mentioned and described in the summons as defendant therein.

B. H. ADAMS.

Sworn to before me this 31st day of May, 1895.

LEWIS B. WOODRUFF,
*Notary Public* (83), *N. Y. Co.*

5 U. S. Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
*against*
GEORGE L. WHITMAN, Defendant.

Please take notice that the defendant appears in this action, and that we are retained as attorneys for him therein, and demand that a copy of the complaint and all papers in this action be served on us at our office, No. 48 Wall street, New York city.

Dated New York, June 14, 1895.

Yours, &c.,
WILSON & WALLIS,
*Attorneys for Defendant.*

Office and post-office address, No. 48 Wall street New York city.

To John A. Shields, Esq., clerk of the U. S. circuit court, so. dist. of N. Y.

(Endorsed:) U. S. circuit court, southern district of N. Y. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Notice of appearance. Wilson & Wallis, attorneys for defendant, No. 48 Wall street, New York city. U. S. circuit court. Filed Jun- 15, 1895. John A. Shields, clerk.

6 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
*against*
GEORGE L. WHITMAN, Defendant.

The plaintiff complaining of the defendant, by Hornblower, Byrne & Taylor, its attorneys, alleges on information and belief:

I. The plaintiff is and was at the time of the commencement of this action a national banking association duly established under the laws of the United States and a corporation duly organized, created by and existing thereunder, and located and doing business at Oxford, in the State of Pennsylvania, and is and was at the time of the commencement of this action a citizen of that State. The defendant is and was at the time of the commencement of this action a citizen of the State of New York, and resided at the time of the commencement of this action and still resides in the southern district of New York. The matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.

II. In the year 1886 a corporation was duly formed, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City bank. Its only place of business was in the
7 city of Arkansas City, in the county of Cowley, and State of Kansas. Its purpose was a general banking and real-estate business and it was not a religious, charitable or railway corporation. In the year 1889, the name of the corporation was duly changed to that of the Arkansas City Investment Company. Thereafter and also after the creation of the obligations of the Arkansas City Investment Company in regard to the two notes hereinafter mentioned, the corporation was duly dissolved by judgment of dissolution rendered by a court of competent jurisdiction, and completely suspended its business, and has ever since failed to resume its usual and ordinary or any business. This dissolution and suspension occurred more than twelve months prior to the institution of the action on the obligations hereinafter mentioned and more than twelve months prior to the commencement of this action. The defendant owned from the formation of the corporation and at all times thereafter, stock therein in the amount of over $50,000, and was entitled to all the privileges and subject to all the liabilities of a stockholder.

III. At all the times hereinbefore or hereinafter mentioned and at the present time, the constitution and statutes of the State of Kansas provided and still provide as follows:

Constitution, article XII, section 2: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

General Statutes, 1868, chapter 23, sec. 32:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable

corporation, and there cannot be found any property whereon
8 to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40, as amended by Laws of 1883, chap. 46, section 1:

"A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

Section 44:

"If any corporation created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution
9 for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

IV. On the 16th day of April, 1895, in the district court of the thirteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, that court being a court of general jurisdiction and having jurisdiction of the subject-matter of the action immediately hereinafter mentioned and of the persons of the parties thereto, the plaintiff herein recovered against The Arkansas City Investment Company, the defendant in an action then pending in that court in which the plaintiff herein was the plaintiff, judgment upon two obligations of the Arkansas City Investment Company for the amount of three thousand four hundred and forty-nine dollars,

with interest thereon at the rate of ten per cent. per annum from that date, together with the costs of that action, then and there taxed at nineteen dollars and thirty cents, the total amount of said judgment being three thousand four hundred and sixty-eight dollars and thirty cents, with interest at ten per cent. from the date thereof.

The obligations, dues or debts unpaid on which the above judgment was recovered were as follows: 1. On or about the 4th day of August, 1890, one J. D. Harkleroad and one E. C. Harkleroad, for value received, duly made, executed and delivered to the Arkansas City Investment Company, J. L. Huey being the cashier and
10 managing officer thereof, their certain promissory note in writing in the words and figures following, to wit:

"ARKANSAS CITY, KANSAS, *Aug. 4th*, 1890.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash'r, at the office of the Arkansas City Investment Company, twenty hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from maturity until paid.

The sureties, guarantors and endorsers of this note severally agree to and do hereby waive demand or presentation of this note for payment to the makers hereof and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension has been granted.

(Signed) J. D. HARKLEROAD.
(Signed) E. C. HARKLEROAD."

No. 19356.

$2,050.00

Due Feb. 4–7, '91.

Notice.

Afterward, and before the maturity of the note, same was duly endorsed and transferred for value to this plaintiff, who is now the lawful holder and owner thereof. At the last-mentioned time the Arkansas City Investment Company, for a good and valuable consideration, entered into and endorsed on the note a contract of guaranty in writing in the words and figures following, to wit:

"For value received, I hereby guarantee the payment of the within note and of any renewals of the same, and hereby waive pro-
11 test, demand and notice of demand and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time without affecting my liability thereon.

ARKANSAS CITY INVESTMENT COMPANY, *Arkansas City, Kansas.*
J. L. HUEY, *Cashier.*"

Plaintiff took the note for value and relying upon the endorsement and guaranty. No part of the note, either principal or interest, has been paid by the maker of said note, or by any other person, save and except the following partial payments made thereon, to wit:

| | | |
|---|---|---|
| 11 February, | 1892 | $700 00 |
| 2 December, | " | 425 00 |
| 10 " | " | 175 00 |
| 31 May, | 1893 | 100 00 |
| 31 March, | 1894 | 200 00 |
| 31 March | " | 155 67 |

No other payments have been made on said note although demand thereof has been duly made of the maker and of the endorser. On the 13th day of April, 1895, there was still due and owing on the note from the Arkansas City Investment Company to this plaintiff, with proper interest computations, the sum of $847.66.

2. On or about the 1st day of September, 1890, one Silas Kennedy, for value received, duly made, executed and delivered to the Arkansas City Investment Company, J. L. Huey being the cashier and managing officer thereof, his certain promissory note in writing in the words and figures following, to wit:

12 "ARKANSAS CITY, KANSAS, *Sept. 1st*, 1890.

"Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash'r, at the office of the Arkansas City Investment Company, twenty-eight hundred and twenty-five dollars, with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid.

"The sureties, guarantors and endorsors on this note severally agree to, and do hereby waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension has been obtained.

(Signed) SILAS KENNEDY."

No. 19403.

$2,825.00

Due M'ch 1–4, '91.

Notice.

Afterward, and before the maturity of the note, the same was duly endorsed and transferred for value to this plaintiff, who is now the lawful holder and owner thereof. At the last-mentioned time the Arkansas City Investment Company, for a good and valuable consideration, entered into and endorsed on the note a contract of guaranty in writing in the words and figures following, to wit:

"For value received, I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand and non-payment and suit against

the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon.

ARKANSAS CITY INVESTMENT CO.,
*Arkansas City, Kansas.*
J. L. HUEY, *Cashier.*"

13 Plaintiff took the note for value and relying upon the endorsement and guaranty. No part of the note, either principal or interest, has been paid by the maker of said note, or by any other person, save and except the following partial payments made thereon, to wit:

| | |
|---|---|
| March 25, 1891 | $400 00 |
| Nov. 25, 1892 | 747 19 |

No other payments have been made on said note, although demand thereof has been duly made of the maker and of the endorser. On the 13th day of April, 1895, there was still due and owing on the note from the Arkansas City Investment Company to this plaintiff, with proper interest computations, the sum of $2,601.71.

V. Thereafter, and on or about the 30th day of April, 1895, an execution was duly issued out of the district court upon the judgment against the property and effects of the Arkansas City Investment Company. There could not be found by the sheriff of the county of Cowley, in the State of Kansas, to whom the execution was directed, any property of the corporation whereon to levy such execution, nor could there be found by the sheriff, or otherwise, with reasonable diligence, or by any means known to the plaintiff, any property or effects of said corporation whereon to levy such execution; such execution was duly returned by said sheriff wholly unsatisfied, and before returning said execution the sheriff of said county entirely exhausted the assets and property of said corporation, and the judgment cannot now be collected by the plaintiff out of any assets of the corporation. The corporation is wholly insolvent and has no assets of any kind, nature or description from which can be met the money due the plaintiff upon the various demands hereinbefore set forth and the judgment recovered
14 thereon. The defendant has not met any part of his liability as a stockholder under the statutes hereinbefore mentioned.

VI. No part of the judgment or of the claims on which it was recovered, except as hereinbefore mentioned, has been paid by the Arkansas City Investment Company or by the defendant or by any other person, although due demand has been made therefor, and there is now due and owing to the plaintiff from this defendant the sum of three thousand four hundred and sixty-eight dollars and thirty cents ($3,468.30) with interest thereon from April 16, 1895, at the rate of ten per cent.

Wherefore, the plaintiff demands judgment against the defendant for the sum of three thousand four hundred and sixty-eight dollars and thirty cents ($3,468.30), with interest thereon at ten per cent. from April 16, 1895, together with the costs of this action.

HORNBLOWER, BYRNE & TAYLOR,
*Plaintiff's Attorneys, 45 William Street, New York City.*

CITY AND COUNTY OF NEW YORK, *ss*:

Howard A. Taylor, being duly sworn, says that he is a member of the firm of Hornblower, Byrne & Taylor, attorneys for the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the facts therein stated to be alleged upon information and belief, and that as to those facts he believes it to be true.

The reason why this complaint is not verified by the plaintiff is that the plaintiff is a foreign corporation, and not within the county where any of its attorneys reside or have their office. The grounds of deponent's belief as to all matters not stated upon his knowledge, are correspondence with the officers of the plaintiff, copies of
15 the judgment and obligations referred to in the complaint which are in deponent's possession, and correspondence with the attorneys for plaintiff in Kansas.

HOWARD A. TAYLOR.

Sworn to before me this 14th day of September, 1895.
EDWARD B. MOWBRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Complaint. Hornblower, Byrne & Taylor, attorneys for plaintiff, 45 William street, New York. Due and timely service of a copy of the within complaint is hereby admitted. Sept. 14, 1895. Wilson & Wallis, def't's att'ys.

Circuit Court of the United States, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
*against*
GEORGE L. WHITMAN, Defendant.

The defendant above named, by Wilson & Wallis, his attorneys, answers the complaint of the above-named plaintiff herein, as follows:

I. *For a First and Separate Defense.*

1. Said defendant denies that he has any knowledge or
16 information sufficient to form a belief as to whether said plaintiff was or is a national banking association, established under the laws of the United States, or duly organized, created by or existing thereunder; or as to whether said plaintiff was or is a citizen of the State of Pennsylvania; or as to whether the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. Said defendant admits that at the time of the commencement of this action he was and still is a citizen of the State of New York, and a resident of the southern district of New York.

3. Said defendant admits that heretofore, and in or about the year 1886, certain proceedings were had for the purpose of forming a corporation of the State of Kansas, under the name of the Arkansas City bank, which was not intended to be a religious, charitable or railway corporation. But said defendant denies that he has any knowledge or information sufficient to form a belief as to whether said Arkansas City bank was duly formed pursuant to the general laws of the State of Kansas, or as to whether in the year 1889, or at any time, the name of said Arkansas City bank was duly changed to that of the Arkansas City Investment Company, or as to whether said Arkansas City bank or said Arkansas City Investment Company thereafter, or at any time, was duly dissolved, or dissolved by judgment of dissolution rendered by a court of competent jurisdiction. And said defendant denies that he has any knowledge or information sufficient to form a belief as to whether said Arkansas City bank or Arkansas City Investment Company, at or within the times in the said complaint mentioned, suspended its business and failed to resume the same as therein alleged.

17 4. Said defendant admits that in or about the year 1886, he became the owner of stock, or what purported to be stock of the Arkansas City bank, in the amount of over fifty thousand dollars. But said defendant denies that he has any knowledge or information sufficient to form a belief as to whether he was entitled to all the privileges or subject to all the liabilities of a stockholder, whether by reason of such ownership or otherwise.

5. Said defendant denies that he has any knowledge or information sufficient to form a belief as to the matters and things alleged in paragraphs three, four, five and six of the said complaint; excepting that said defendant admits that he, said defendant, has not hitherto been subjected to any liability as a stockholder of said Arkansas City bank, or said Arkansas City Investment Company, and that he has not paid any part of any judgment or judgments against the same; and said defendant denies that there is now or ever has been due or owing from him to the said plaintiff the sum of three thousand four hundred and sixty-eight dollars and thirty cents, with interest, as alleged in paragraph six of said complaint, or any part of said sum, or any sum whatsoever.

6. Said defendant denies each and every other allegation in said complaint contained, not hereinbefore specifically admitted, qualified or denied.

II. *For a Second and Separate Defense.*

Said defendant alleges that, as he is advised and believes, this court has not jurisdiction of the subject of the action or of the subject of the cause of action alleged or attempted to be alleged in the said complaint.

18 III. *For a Third and Separate Defense.*

Said defendant alleges that, as he is advised and believes, the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendant demands judgment; that the said complaint be dismissed, with costs.

WILSON & WALLIS,
*Defendant's Attorneys*, 48 *Wall Street, New York City.*

CITY AND COUNTY OF NEW YORK, *ss*:

George L. Whitman, being duly sworn, says: That he is the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEO. L. WHITMAN.

Sworn to before me this 23d day of October, 1895.

WM. E. ZABRISKIE,
[SEAL.] *Notary Public* (1), *N. Y. Co.*

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The National Bank of Oxford ag'st George L. Whitman. Answer. Wilson & Wallis, def't's att'ys, 48 Wall St., N. Y. city. U. S. circuit court, filed Oct. 3, 1895. John A. Shields, clerk.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Hoyt H. Wheeler, circuit judge.

THE NATIONAL BANK OF OXFORD
*vs.*
GEORGE L. WHITMAN.

Now comes the plaintiff, by Howard A. Taylor, Esq., its attorney, and moves the trial of this cause.

Likewise comes the defendant, by William G. Wilson, Esq., his attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the plaintiff and the argument of counsel, the jury, by direction of the court, say that they find a verdict for the plaintiff for the amount demanded in the complaint, and so they say all.

Mr. Wilson moves to set aside the verdict.

A stay of forty days granted.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

20 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD
*vs.*
GEORGE C. WHITMAN. } At Law.

WHEELER, *J.:*

The constitution of Kansas provides, art. XII: "SEC. 2. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholder," and the General Statutes of that State, 1889:

"(1192.) *Execution against Stockholders; Action.*

SECTION 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any shareholder, excepting upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

21 The defendant was an original holder of a large part of the stock of the Arkansas City Investment Co., a corporation existing under and subject to these provisions, against the property of which an execution issued on a judgment there in favor of the plaintiff and was returned unsatisfied. This action is brought upon the last clause of the statute to charge him with the amount of this judgment, which is much less than the amount of his stock. Notes which were the foundation of the judgment were proved with it, and a verdict was directed for the plaintiff, and the case has now been submitted on a motion to set aside the verdict principally because the suit is brought here outside of the State of Kansas.

Several cases of great weight and entitled to very respectful consideration have been cited to the effect that the action is wholly local. Bank of N. A. *vs.* Rindge, 154 Mass., 203; Fowler *vs.* Lamson, 146, 111, 472; Marshall *vs.* Sherman, 148 N. G., 9. But in Howell *vs.* Mangelsdorf, 33 Kan., 194, the supreme court of Kansas, after observing that two remedies were prescribed in this statute, and holding that the notice of motion required in one could not be given without the State, said as to the other, which is this one:

"This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to en-

force the same is transitory and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

That the construction of the constitutions and statutes of States by their tribunals is binding is not questioned, but this declaration is said to be so far merely *obiter* as not to be authoritative. The question whether the action is transitory and could be maintained without the State was not directly in judgment; but it was
22 so before the court, in construing the provisions of the constitution and statutes together, that it appears to have received full consideration. The opinion of the court upon it is at least entitled to great weight elsewhere. The action itself is personal, no special proceedings are provided for in it, and, according to the decisions of the Supreme Court of the United States, it would appear to be transitory (Flash *vs.* Conn., 109 U. S., 371.) It is said that the jurisdiction of this court is concurrent, and so only coextensive, with that of the courts of New York; and that this court here should not take cognizance of cases that those courts would not. The declining of jurisdiction by those courts cannot, however, take from this court that which properly belongs to it; and the decision of what belongs to this, at least, must ultimately be determined by the Supreme Court of the United States. The decisions of that court must be followed here, as understood; and so by them this motion must be overruled.

Motion denied; and judgment on verdict ordered.

William B. Hornblower, for plaintiff.
William G. Wilson, for defendant.

(Endorsed:) U. S. circuit court, south. dist. N. Y. National Bank of Oxford *vs.* George C. Whitman. Opinion, Wheeler, J. U. S. circuit court. Filed Aug. 18, 1896. John A. Shields, clerk.

23 At a term of the circuit court of the United States for the second circuit, held in and for the southern district of New York, at the Federal building, in the city of New York, on the 24th day of August, 1896.

Present: Hon. Hoyt H. Wheeler, judge.

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| THE NATIONAL BANK OF OXFORD, Plaintiff, *vs.* GEORGE L. WHITMAN, Defendant. | Order Denying Motion to Set Aside the Verdict. |

The issues in this action having come on for trial at a stated term of this court, and a jury having on the 11th day of June, 1896, under direction of the court found a verdict for the plaintiff for $3,868.05, with interest at ten per cent., and the defendant having moved upon the minutes to set the verdict aside:

Now, on the papers, pleadings and the minutes and all proceedings herein, and after hearing Mr. William G. Wilson, of counsel for defendant, in favor of the motion, and Mr. William B. Hornblower and Mr. Howard A. Taylor, of counsel for plaintiff, in opposition thereto, and due deliberation having been had thereon,

And on motion of Hornblower, Byrne & Taylor, attorneys for plaintiff, it is ordered, that the defendant's motion to set
24 aside the verdict be, and the same hereby is, denied, and that the plaintiff have judgment upon the verdict.

HOYT H. WHEELER.

(Endorsed:) United States circuit court, southern dist. of New York. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Order denying motion to set aside the verdict. Hornblower, Byrne & Taylor, attorneys for plaintiff, 30 Broad street, New York. U. S. circuit court. Filed August 24, 1896. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
*vs.*
GEORGE L. WHITMAN, Defendant.
} Judgment, $4,205.48. 1 December, 1896.

The summons issued out of this court having been personally served upon the defendant, George L. Whitman, within the State of New York, in the southern district of New York, and this defendant having appeared generally by Messrs. Wilson & Wallis, his attorneys, and all the issues having come on for trial at a stated term of this court, held at the Federal building in the city of New York, and a jury having been impaneled and the issues having
25 been tried before the Honorable Hoyt H. Wheeler, district judge, and trial having proceeded from day to day, and the jury having on the 11th day of June, 1896, under direction of the court found a verdict for the plaintiff for three thousand eight hundred and sixty-eight dollars and five cents ($3,868.05), with interest at ten per cent., and the defendant having moved upon the minutes to set the verdict aside and the motion to set aside the verdict having been duly considered, and thereafter, on the 24th day of August, 1896, an order having been entered denying the same and directing that the plaintiff have judgment upon the verdict, and the plaintiff's costs having been duly taxed:

Now, on the summons and complaint herein, and due proof of personal service thereof upon the defendant, and on the defendant's notice of appearance, the answer, the extract from the minutes of the clerk of this court, the order denying the motion to set aside the verdict, as aforesaid, and on all the papers and proceedings herein, and on motion of Hornblower, Byrne & Taylor, attorneys for the plaintiff, it is

Ordered and adjudged, that The National Bank of Oxford, plaintiff herein, do recover of the defendant George L. Whitman, the principal sum of three thousand eight hundred and sixty-eight dollars and five cents ($3,868.05) with interest thereon at ten per cent. from 11th June, 1896, viz: one hundred and eighty-two dollars and sixty-five cents ($182.65), and one hundred and fifty-four $\frac{78}{100}$ dollars ($154.78), its costs and disbursements as taxed; amounting in

the whole to four thousand two hundred and five $\frac{48}{100}$ dollars ($4,205.48), with interest from 1st December, 1896, the date hereof, at ten per cent.; and that the plaintiff have execution therefor.

Judgment signed this first day of December, 1896.

JOHN A. SHIELDS, *Clerk.*

26 Take notice that the within is a copy of the judgment this day entered and filed in the judgment-roll in the office of the clerk of this court.

Dated New York, 1st December, 1896.

Yours, &c.,

HORNBLOWER, BYRNE & TAYLOR,
*Attorneys for Plaintiff.*

Office and post-office address, 30 Broad street, New York city.

To Messrs. Wilson & Wallis, attorneys for defendant.

(Endorsed:) United States circuit court, southern district of New York. The National Bank of Oxford *v.* George L. Whitman. Judgment-roll. Hornblower, Byrne & Taylor, attorneys for plaintiff, 30 Broad street, New York city. U. S. circuit court. Filed Dec. 1, 1896, 3.14 p. m. John A. Shields, clerk.

27 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD, Plaintiff,
*against*
GEORGE L. WHITMAN, Defendant. } Bill of Exceptions.

Afterwards, to wit, on the tenth day of June, 1896, at a stated term of said court, held at the city of New York, before Hon. Hoyt H. Wheeler, the issues joined between the parties coming on to be tried before the said judge, and a jury having been duly sworn and empaneled, plaintiff being represented by William B. Hornblower and Howard A. Taylor, and the defendant by William G. Wilson, their respective counsel, the following proceedings were had:

JOHN E. RAMSEY, sworn and examined on behalf of the plaintiff, testified as follows:

By Mr. TAYLOR:

Q. What is your business?

A. My business is cashier of the National Bank of Oxford.

Q. Is that an institution organized under the laws of the United States?

A. Yes, sir.

Q. For banking purposes?

A. Yes, sir.

Q. Under the national banking act?

A. Yes, sir.

Q. Where is its place of business?

28 A. It is located at Oxford, Chester county, Pennsylvania.
Q. Is that its only place of business?
A. Yes, sir.

No cross examination.

Plaintiff's counsel then read from the deposition of James L. Huey, taken in this cause at Arkansas City, as follows:

J. L. HUEY, being first duly sworn upon his oath, testifies as follows:

Direct examination:

Q. State your name.
A. J. L. Huey.
Q. Where do you reside, Mr. Huey?
A. Arkansas City, Kansas.
Q. How long have you resided in Arkansas City, Kansas?
A. Twenty-three years.
Q. Are you acquainted with an institution which formerly did business in Arkansas City, Kansas, known as the Arkansas City Investment Company?
A. Yes.
Q. When did you first become acquainted with this company?
A. Well, about the 1st of June, 1889.

Plaintiff's counsel offers in evidence certified copy of the articles of incorporation of the Arkansas City bank. Received and marked "Plaintiff's Exhibit 1 of this date."

PLAINTIFF'S EXHIBIT 1.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. E. Edwards is the duly elected, qualified and
29 acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS, OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original articles of incorporation of the Arkansas City bank, filed in my office December 1, 1886.

In testimony whereof, I have hereunto subscribed my name and

affixed my official seal. Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

W. C. EDWARDS,
[SEAL.] *Secretary of State.*
By —— ——,
*Assistant Secretary of State.*

*Articles of Incorporation of the Arkansas City Bank.*

First. The name of the corporation is the Arkansas City bank.

Second. This corporation is formed for the purpose of receiving money on deposit and of allowing interest thereon, or otherwise, of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, and all other bonds and
30 securities, of loaning money on real-estate and personal security, of discounting negotiable notes and non-negotiable notes, and other written securities, and of owning, buying and selling real estate.

Third. The place where its business is to be transacted is the city of Arkansas City, in the county of Cowley and State of Kansas.

Fourth. This corporation shall exist for the term of ten years from the first day of January, 1887.

Fifth. The number of its directors shall be five, and the names and residences thereof for the first year are—

Samuel Newell, of New York city, N. Y.
George L. Whitman, of New York city, N. Y.
James L. Huey, of Arkansas City, Kansas.
Chas. Hutchins, of Arkansas City, Kansas.
Frank J. Hess, of Arkansas City, Kansas.

Sixth. The amount of its capital stock is two hundred thousand dollars, divided into two thousand shares of one hundred dollars each.

In testimony whereof, we, the undersigned, have hereunto set our hands as incorporators this second day of September, A. D. 1896.

JAMES L. HUEY.
CHAS. HUTCHINS.
FRANK J. HESS.
GEO. L. WHITMAN.
SAMUEL NEWELL.

STATE OF KANSAS, } *ss:*
*Cowley County,* }

Be it remembered that on this second day of September, A. D. 1886, personally came before the undersigned, a notary public within and for said county and State, James L. Huey, Chas. Hutchins and Frank J. Hess, all of whom are personally known to
31 me to be the identical persons who executed the above and foregoing articles of incorporation, the said James L. Huey, Chas. Hutchins and Frank J. Hess being personally known to me to be residents of the State of Kansas, and said persons acknowledge

that they executed the above instrument of writing for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

RICHARD U. HESS,
[SEAL.] *Notary Public.*

Commission expires July 14, 1888.

STATE OF NEW YORK, }
*City and County of New York,* } *ss:*

Be it remembered that on this 12th day of November, A. D. 1886, personally came before me, the undersigned, a notary public within and for the county and city of New York aforesaid, Samuel Newell and George L. Whitman, to me known to be the same persons who signed the foregoing instrument of writing as incorporators, and said persons acknowledged that they executed the same for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

CHAS. L. THATCHER,
[SEAL.] *Notary Public* (78), *N. Y. Co.*

Commission expires March 30, 1888.

(Endorsed:) Filed for record Dec. 1, 1886. E. B. Allen, sec'y of state.

Also certificate as to the amount of the capital stock and the number of shares of said bank. Received and marked "Plaintiff's Exhibit 2."

32 PLAINTIFF'S EXHIBIT 2.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. C. Edwards is the duly elected, qualified and acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature, and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof, I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS,
OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original certificate relating to capital stock of the Arkansas City bank on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed my official seal.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

W. C. EDWARDS,
*Secretary of State,*

[SEAL.]

By —— ——,
*Assistant Secretary of State.*

33 *Certificate of the President and Secretary of the Arkansas City Bank.*

Samuel Newell, president, and James L. Huey, secretary of the Arkansas City bank, does each for himself hereby certify that the name of the corporation is the Arkansas City bank.

That the name of the location where said bank is located is Arkansas City, Cowley county, Kansas.

That the amount of the capital stock of said bank is two hundred thousand dollars; that the number of shares into which the capital stock is divided is two thousand; that the names and residences of each stockholder and the number of each stockholder's shares are as follows, namely:

George L. Whitman, New York city, New York, one thousand shares.

Samuel Newell, New York city, New York, six hundred and forty-nine shares.

James L. Huey, Arkansas City, Kansas, three hundred and forty-nine shares.

Mary L. Newell, New York city, New York, one share.

Mary E. Huey, Arkansas City, Kansas, one share.

And that said bank was organized on the fourth day of December, A. D. 1886.

In testimony whereof, we, the undersigned, have hereunto set our hands and seals this 10th day of December, A. D. 1886.

SAMUEL NEWELL, *President.*
J. L. HUEY, *Sec'y.*

STATE OF KANSAS, } ss:
*Cowley County,* }

Be it remembered that on the 28th day of December, A. D. 1886, personally came before the undersigned, a notary public within and for said county and State, James L. Huey, who is personally known to me to be the identical person who executed the above and
34 foregoing certificate; the said James L. Huey being personally known to me to be a resident of the State of Kansas, and said person acknowledged that he executed the above instrument of writing for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

RICHARD U. HESS,
*Notary Public.*

Commission expires July 14, 1888.

STATE OF NEW YORK, } ss.:
*County and City of New York,* }

Be it remembered, that on this tenth day of December, A. D. 1886, personally came before the undersigned, a notary public within and for the county and city of New York aforesaid, Samuel Newell, to me known to be the same person who signed the foregoing instrument of writing, and said person acknowledged that he executed the same for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

CHARLES L. THATCHER,
*Notary Public* (78), *N. Y. Co.*

Commission expires March 30, 1888.

(Endorsed:) Certificate of the Arkansas City bank, Arkansas City, Kansas.

Q. Did you have any connection with the Arkansas City bank in an official way?

A. I did.

Q. What was it?

A. I was the cashier.

Q. How long did you hold that position?

A. From the organization of the bank.

35 Q. To what time?

A. All the time until after the time we changed the name, and then after we changed the name until December, 1890.

Q. Where did the Arkansas City bank do business?

A. In Arkansas City, Kansas.

Q. Where did the Arkansas City Investment Company do its business?

A. In Arkansas City, Kansas.

Q. Do you mean that they maintained their main office and place of business at Arkansas City, Kansas?

A. Yes.

Q. Have you in your possession the minute book of the Arkansas City bank, in which is recorded the minutes of the proceedings of the board of directors, and also of its stockholders?

A. No.

Q. Where is that book, if you know?

A. I don't know.

Q. Was there any such a book ever kept?

A. No; we never kept, strictly speaking, a minute book.

Q. Was any record made of the proceedings of the stockholders and directors?

A. Yes.

Q. Have you such a record?

A. No; I haven't got it.

Q. Do you know where it is at this time?

A. I don't.

Q. Since the service of process upon you for your attendance here as a witness have you made search for the record, in whatever form it may have been kept, of the proceedings of the stockholders and also of the directors of the Arkansas City bank?

A. I looked through what papers and books were turned over to me by the former assignee.

Q. Could you find any such book or record?

A. No.

36 Q. Is that the only place you had of making search from which you could probably obtain the book or record?

A. That is the only place that it could be, if it was in Arkansas City at all.

A. And you failed to find it?

A. I didn't find it; no.

Q. Were you present at the different meetings of the stockholders and directors of the Arkansas City bank when it was a running corporation?

A. Yes.

Q. Please state the date, as nearly as you can remember, when this corporation was organized?

A. The organization was organized some time in December, 1886; commenced to do business as a corporation on the 1st of January, 1887.

Q. After the incorporation of the Arkansas City bank was any stock issued, and if so, was the record made and kept of such stock so issued?

A. There was.

Q. Have you in your possession the original record of the issuance of stock in the Arkansas City bank?

A. I have.

Q. Will you please produce it?

A. (Witness produces book.)

Q. I notice upon the stub record here a memorandum. In whose handwriting is that, if you know?

A. (Looking at paper.) That's mine.

Q. When did you make that record?

A. On the 30th day of December, 1886.

Q. Was that the only record kept of the issuance of stock to the stockholders of the Arkansas City bank?

A. That, I believe, is the only record we had.

Q. Please look through the several stubs there and say, if you know, in whose handwriting the entire record is made of all the stock issued?

A. (Looking through record.) It's my own; so far as this record goes, it is.

37 Q. Was any stock ever issued to any other persons other than as shown there?

A. None that I have any knowledge of.

Q. Will you permit that original record to be introduced in evidence and attached to your deposition and made a part of it?

A. No; I don't know that I care about letting these get off. There's plenty here to make copies of them.

Q. Will you permit the notary to take that record and make a copy of each of the stubs of record of stock issued, and attach same to this your deposition, properly identifying it as "Exhibits C, D, E, F and G"?

A. Yes.

(By DEFENDANT'S COUNSEL:)

Q. Mr. Huey, these papers that you now speak of were merely memorandums made by you on separate pieces of paper for the certificates of stock of the Arkansas City bank, issued to different individuals at the time that you state?

A. Yes.

Q. Is this record the original one of all the stock issued in the Arkansas City bank?

A. That is all the record I know anything about, and is the only one, so far as I can remember, of any stock that was issued; and that is all the stock that I ever had any knowledge of being issued, as shown on those stubs.

Q. From these stubs, did you detach any paper at the time of the issuance?

A. Yes, I did.

Q. What did you detach from these stubs of record above identified?

A. The certificates of stock that were issued to the stockholders.

Q. Do you have a knowledge of the delivery of any of the certificates of stock so issued; and if so, you may mention the persons to whom the same was delivered.

38 A. The stock—three certificates were delivered to Samuel Newell, and two of the certificates were retained by me.

Q. To whom did you deliver certificate number one for one thousand shares?

A. It was delivered to Samuel Newell.

Q. Are you acquainted with the defendant George L. Whitman?

A. I am.

Q. How long have you known him?

A. I got acquainted with him, I think it was, in 1885.

Q. Where?

A. At Arkansas City, Kansas.

Q. He was then here at that time?

A. He was.

Q. Have you seen him since that time?

A. Yes, sir.

Q. Where?

A. At Arkansas City, Kansas, and New York city.

Q. When did you next see him in Arkansas City, Kansas?

A. I think it was in October, 1889.

Q. Did you ever see in his possession the original certificate of stock which you have stated was detached from the record here marked No. 1?

A. Yes, I did.

Q. Where was that?

A. In New York city.

Q. Did you have a conversation with him at that time with reference to that certificate of stock, and of his holding the same?

A. Not exactly about that particular piece of paper.

Q. Was anything said in that conversation between Mr. Whitman and yourself about the affairs of the Arkansas City bank?

A. Yes; I think there was.

Q. After the organization of this corporation, the Arkansas City bank, and after it began business, were any dividends declared and paid to the stockholders?

39 A. There were.

Q. Who made the payment of these dividends?

A. I did.

Q. To whom did you make these payments?

A. To the stockholders direct.

Q. Who were they?

A. George L. Whitman, Samuel Newell, Mary L Newell, J. L. Huey and Mary E. Huey. I want to qualify my answer a little. In relation to the payment of dividends, I didn't pay any dividends direct to Mrs. Newell nor Mrs. Huey, but they were sent to Mr. Newell, and Mrs. Huey's part was retained by myself.

Q. You now remember the amount of dividends furnished to George L. Whitman?

A. There was ten per cent. in the years 1887 and 1888, those two years, and 1889, three years; and if I am not mistaken there was a dividend paid the 1st of July, 1890, but I am not sure; I don't say for sure whether there was a dividend paid the 1st of July or not.

Q. Has there ever been any transfer made upon the books of the Arkansas City bank of certificate No. 1, of its stock for one thousand (1,000) shares, which was issued to George L. Whitman?

A. Not that I have any knowledge of.

Q. In whose possession has this record book been that you have produced since the issuance of the stock you note?

A. Until December, 1890, it was in my possession, or up to December, 1890, it was in my possession, and from that time until about the 1st of December, 1894, it was in Charles A. Scruton's possession.

Q. When did it again come into your possession?

A. About the 1st of December, 1894.

Q. And who has had its custody since then?

A. I have.

Q. Have you the minute book of the proceedings of the stockholders and officers of the Arkansas City bank, made at that time, or about then?

A. I have not.

40 Q. Was any minute book kept of such proceedings?

A. Minutes were written out on legal-cap paper, but not in the form of a book.

Q. Do you know what was done with that legal-cap paper upon which they were written?

A. Mr. Newell took them away with him when he left; that is my recollection of it, anyway.

Q. When was that?

A. That was, I think, some time in the month of May, 1889; May or June, I don't know which.

Q. Have you made diligent search among your books and papers for this record?

A. I have.

Q. Have you found it?

A. No, sir..

Q. You may now state what was done by the stockholders and officers of the Arkansas City bank with reference to the cessation of business as a bank and the furtherance of any other business?

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business and wanted to have the use of the name of the Arkansas City bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City bank and selected the name of the
41 Arkansas City Investment Company. And under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings.

Motion denied. Defendant excepts.

Q. Was a copy of these proceedings made and furnished to the secretary of state of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

Plaintiff's counsel offered in evidence a duly certified copy from the office of the secretary of state of the State of Kansas of the proceedings of the stockholders of the Arkansas City bank, for the changing of its name; certified by the secretary of the company, and attested by the secretary of state of Kansas.

By DEFENDANT'S COUNSEL: I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders, and, furthermore, that it is not in compliance with the requirements of the laws of Kansas.

Objection overruled. Defendant excepts. Paper admitted in evidence and marked "Plaintiff's Exhibit No. 3."

42 PLAINTIFF'S EXHIBIT No. 3.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. C. Edwards is the duly elected, qualified and acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS,
OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original certificate of change of name of the Arkansas City bank, filed in my office June 5, 1889.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] W. C. EDWARDS,
*Secretary of State,*
By —— ——,
*Assistant Secretary of State.*

43 STATE OF KANSAS, } ss:
*Cowley County,* }

I, James L. Huey, being duly sworn, depose and say: That at a meeting of the stockholders of the Arkansas City bank held at Arkansas City, Cowley county, Kansas, on the 25th day of May, A. D. 1889, the stockholders unanimously voted to adopt the name "The Arkansas City Investment Company." And that I am the secretary of said corporation.

JAMES L. HUEY.

Subscribed and sworn to before me this 25th day of May, A. D. 1889.

JOHN H. HARTMAN,
[SEAL.] *Notary Public.*

Commission expires May 15, 1892.
Affidavit filed June 5, 1889.

Q. After this change of name to the Arkansas City Investment Company, was the old stock issued to the Arkansas City bank, surrendered, and any new stock issued?

A. No; there wasn't.

Q. What was done by the new institution with its stockholders in the way of stock?

A. The stock was left standing as it was. No change was made in it. No stock was issued and the old stock was left standing just as it was when it was made.

Q. Then this record that you have produced of the shares of stock issued is the entire record of the stock in the Arkansas City bank and the Arkansas City Investment Company?

A. That's all the record that I know anything about in relation to the stock of the Arkansas City bank and the Arkansas City Investment Company.

Q. What position did you occupy in the Arkansas City Investment Company?

A. I was cashier.

Q. As such officer, did you also act as secretary at the meetings of the stockholders?

44 A. I did.

Q. I believe you have stated that the Arkansas City Investment Company continued its business until December, 1890?

A. Yes.

Q. What was then done?

A. An assignment was made.

Q. (Handing paper.) I now hand you a paper and ask you whose signature is attached to that paper, if you know?

A. (Looking at paper.) It's my signature.

Q. When did you sign that paper?

A. About the 15th day of December, 1890.

Q. Was that the paper you signed at the time of the making of the assignment?

A. It's my opinion—I should say "yes."

Q. Will you permit the notary to identify that paper and attach it to this deposition and make it a part of it?

A. I have no control of it; I can't consent to it.

Plaintiff's counsel then offered in evidence copy of the assignment or deed of assignment, properly authenticated. Admitted in evidence and marked "Plaintiff's Exhibit 4" of this date.

PLAINTIFF'S EXHIBIT 4.

Know all men by these presents, that the Arkansas City Investment Company of Arkansas City, Cowley county, Kansas, for value received, does hereby grant, bargain, sell, assign and convey to Charles A. Scruton, of the same place, all its lands, tenements, goods, chattels, effects and credits for the benefits of all the creditors of the said assignor in proportion to their respective claims.

In witness whereof, the said assignor caused its hand to be hereto

affixed, and these presents attested by its president and secretary, this fifteenth day of December, A. D. 1890.

[The Arkansas City Investment Company Seal.]

SAMUEL NEWELL, *As President.*
J. L. HUEY, *As Secretary.*

45 STATE OF KANSAS, } ss:
*Cowley County,* }

On this fifteenth day of December, A. D. 1890, before me the undersigned, a notary public in and for Cowley county and State of Kansas, personally came Samuel Newell and James L. Huey, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged that they executed the same as president and secretary of said company.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

RICHARD U. HESS,
*Notary Public.*

[SEAL.]

My commission expires July 7th, 1892.

Filed for record on the 15th day of December, A. D. 1890, at 7 o'clock p. m.

A. A. JACKSON,
*Register of Deeds,*
By GUY L. SPARKS, *Deputy.*

STATE OF KANSAS, } ss:
*County of Cowley,* }

I, J. D. Maurer, register of deeds in and for said county, do hereby certify that the foregoing is a full and correct copy of the complete record of deed of assignment from the Arkansas City Investment Company to Charles A. Scruton. Recorded in Journal C, page 518, as the same appears in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said office at the city of Winfield this the 6th day of April, A. D. 1896.

J. D. MAURER,
*Register of Deeds.*

46 STATE OF KANSAS, } ss:
*County of Cowley,* }

I, J. A. Burnette, judge of the 19th judicial district of said State, and presiding judge of the district court of said county, do hereby certify that J. D. Maurer, by whom the above attestation was made, was, at the date thereof, register of deeds of said county duly qualified, and that the same is in due form of law and made by the proper officer.

Dated April 6th, A. D. 1896.

J. A. BURNETTE, *Judge.*

STATE OF KANSAS, } ss:
*County of Cowley,* }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that Hon. J. A. Burnette, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof presiding judge of said court, duly commissioned, sworn and acting.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Winfield, this the 6th day of April, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

Q. At the time of the making of the deed of assignment, was there also made out a schedule of the liabilities of the Arkansas City Investment Company?

A. Yes, sir.

Q. I ask you to look at the paper you now hold, and state if that is signed by you also?

A. (Looking at paper.) It is.

Q. Do you know what was done with the business of the Arkansas City Investment Company after the making of this assignment?

A. Yes, sir.

Q. You may state it.

47 A. The assets were turned over to the assignee, Charles A. Scruton, who took charge of them and collected and attended to the business until November, 1894, and they were again delivered to me as assignee of the same institution, and the balance on hand on the 4th day of November, 1895, was sold.

Q. After the making of this assignment, was any new business done?

A. No; no new business was done; not as I know of.

Q. (Handing witness paper.) I hand you a paper and ask you to state if you have ever seen it before, and when and where.

A. Well, I saw it at the time it was executed; about September 1, 1890.

Q. Did you see the same signed?

A. I did.

Q. By whom?

A. Silas Kennedy.

Q. What was done with that paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the district court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, of Oxford, Pennsylvania.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Did you personally attend to the discounting of that paper?

48 A. I did not.

Q. How was it done?

A. Why, through a party in Kansas City by the name of Abell.

Q. Was that discount ever taken up by the Arkansas City Investment Company, while it was an active concern, and before its assignment?

A. No, sir.

Q. Then this paper was outstanding at the time of the making of the deed of assignment?

A. It was.

Q. I see upon the back of this note a rubber stamp and under it in writing the name of J. L. Huey, cashier (handing paper to witness). Please look at it and state if that is your signature.

A. It is my signature; yes.

Q. Did you place the rubber stamp upon the back and above your signature?

A. I did.

Q. That was before the discounting of the note?

A. Yes, sir.

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked "Plaintiff's Exhibit 5."

49 PLAINTIFF'S EXHIBIT 5.

ARKANSAS CITY, KANSAS, *Sept.* 1, 1890.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash., at the office of the Arkansas City Investment Company, twenty-eight hundred & twenty-five dollars with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid. The sureties, g-rantors and endorsers on this note severally agree to, and do hereby waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension had been obtained.

SILAS KENNEDY.

No. 19403.

$2,825.00.

Due M'ch 1-4, '91.

Notice.

Payable at Gilman Sons & Co., 62 Cedar St., New York City.

(Endorsed:) For value received, I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon. Arkansas City Improvement Co., Arkansas city, Kansas. J. L. Huey, cashier. M'ch 25, '91, rec'd $400.00 of Chas. A. Scruton, assignee; Nov. 25, '92, rec'd of Chas. A. Scruton, assignee, seven hundred forty-seven & $\frac{12}{100}$ dollars, being 30 % div. on claim of $2,490.65 allowed Oct. 26, '92.

50 Q. I hand you another note, dated August 4, 1890 (handing note), and will ask you whether you have ever seen that note before.

A. Yes, sir.

Q. Where?

A. In the Arkansas City Investment Company, after its execution August 4, 1890.

Q. Did you see it signed?

A. Yes, sir.

Q. Was it executed in your presence?

A. It was.

Q. And do you know the signatures?

A. I do.

Q. You may state whose they are.

A. J. D. Harkleroad and E. C. Harkleroad.

Q. What was done with that note after its execution and delivery to the Arkansas City Investment Company?

A. It was discounted through the National Bank of Oxford through Mr. Abell.

Q. The plaintiff in this case?

A. The plaintiff in this case.

Q. Did you place the endorsement upon the back of that note which appears there?

A. Yes, sir.

Q. I mean by that endorsement of the Arkansas City Investment Company?

A. Of the Arkansas City Investment Company and also mine, as J. L. Huey, cashier.

Q. Was that note ever taken up by the Arkansas City Investment Company before its assignment?

A. It was not.

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

51 Said note was received in evidence and marked "Plaintiff's Exhibit 6" of this date.

PLAINTIFF'S EXHIBIT 6.

ARKANSAS CITY, KANSAS, *Aug.* 4, 1890.

Payable at Gilman Sons & Co., 62 Cedar St., New York city.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash., at the office of the Arkansas City Investment Company, twenty hundred and fifty dollars with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid. The sureties, guarantors and endorsers on this note severally agree to, and do hereby, waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension had been obtained.

J. D. HARKLEROAD.
E. C. HARKLEROAD.

No. 19,356.

$2,050.00.

Due Feb. 4–7, '91.

Notice.

(Endorsed:) For value received I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand, and non-payment and suit against the maker, and consent that the payment of this note
52 may be extended from time to time, without affecting my liability thereon. Arkansas City Investment Co., Arkansas city, Kansas. J. L. Huey, cash.

| | | | |
|---|---|---|---|
| Feb'y 11, '92 | rec'd | ..... | $700 00 |
| Dec. 2, '92 | " | ..... | 425 00 |
| Dec. 10, '92 | " | ..... | 175 00 |
| May 31, '92 | " | ..... | 100 00 |
| M'ch 31, '94 | " | ..... | 200 00 |
| M'ch 31, '94 | " | of Chas. A. Scruton, assignee ..... | 155 67 |

Q. What did the Arkansas City Investment Company receive for both of these notes which you have just described, when they were discounted, as you have stated?

A. Why, they were discounted at the rate of eight per cent. per annum, and we received exchange on Kansas City and New York, for the proceeds from Kansas City.

Q. What do you mean by "we," in your last answer?

A. Why the Arkansas City Investment Company.

Q. I believe that you have stated that you became assignee of the Arkansas City Investment Company and a successor to Charles A.

Scruton, its former assignee, in or about November, 1894. Have you continued to handle this trust since that time?

A. Yes, sir.

Q. What has been done with the assets that were turned over to you by Mr. Scruton?

A. They were sold, nearly all of them, on the 4th of November, 1895.

Q. After paying the expenses of the trust, including all expenses until it is wound up, how much remains from the proceeds of the sale of these assets?

A. Nothing.

53 Q. During the management of the trust by you, were any dividends declared and paid to the creditors?

A. No, sir.

Q Then at this time there remain no assets with which to make any payments to the creditors of the Arkansas City Investment Company?

A. There are none; no, sir.

Q. Have you made a final report as assignee?

A. I have.

Q. And asked a discharge by the court?

A. I did.

Q. When did you make and file your final report and petition for this discharge?

A. 6th of January, 1896.

Plaintiff's counsel offered in evidence an order of the Kansas court discharging the assignee of the Kansas City Investment Company.

Objected to by the defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked "Plaintiff's Exhibit 7" of this date.

PLAINTIFF'S EXHIBIT 7.

Be it remembered, that on this 2nd day of June, A. D. 1896, the same being the first judicial day of the regular June term in the year 1896, of the district court of the nineteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, court convened, there being present the Honorable J. A. Burnette, sole presiding judge of said court, Adam Staggers, clerk of said court, and J. W. Skinner, shereiff of said county:

54 Whereupon the following proceedings were had:

*Assignment of the Arkansas City Investment Co. No. 5239.*

Now on this 2nd day of June, 1896, this cause comes on for hearing on the motion of James L. Huey, assignee, for an order approving and confirming the report of the commissioner herein, C. T. Atkinson, and also for an order approving and confirming the several reports of the said assignee, James L. Huey, and all his pro-

ceedings and for allowance of his compensation, and also compensation of said commissioner, and for discharge of said assignee together with his bondsmen from all liability. The said assignee appearing by Troup & Brown, his attorneys, and the said commissioner, C. T. Atkinson, appearing in person, and several creditors of said estate appearing by Madden & Buckman and Pollock & Love, their respective attorneys.

Thereupon the court finds after a full examination of the facts herein that said motion should be sustained, and that said assignee has in his hands at this time the sum of nineteen hundred and fifty-one and $\frac{27}{100}$ dollars, to be paid as hereinafter directed.

It is, therefore, ordered, adjudged and decreed by the court, that said motion be and the same is hereby sustained, and it is further ordered and decreed, that the report of said commissioner be and the same is approved, together with the several reports of the said James L. Huey as assignee, and he is hereby discharged, and, together with his bondsmen, released from all liability
55 herein. Said assignee is allowed as compensation for his services herein for his full term the sum of nine hundred ($900) dollars, and said commissioner is also allowed the sum of fifty ($50) dollars for his services herein, together with the services of stenographer, in making said report.

It is also further ordered, that the balance in the hands of said assignee at this time, being the sum of one thousand and one and $\frac{27}{100}$ ($1,001.27) dollars, be by him paid as follows, to wit: To Troup & Brown, the sum of twenty-five dollars ($25); to A. D. Norton and K. A. Norton, the sum of four hundred and twenty-five — ($425), to apply on the two judgments in cases Nos. 5249 and 5250, and to the clerk of this court on account of unpaid court costs in several cases the sum of five hundred and fifty-one and $\frac{27}{100}$ ($551.27) dollars.

It is further provided that said assignee shall not be discharged nor relieved from liability until such payments are duly made.

STATE OF KANSAS, } ss:
*Cowley County,* }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that the within and foregoing is a full, true and correct copy of certain proceedings had in said court, in the case therein entitled, as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Winfield, this 2d day of June, 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

STATE OF KANSAS, } ss:
*County of Cowley,* }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify, that the foregoing is a full and correct copy of the complete record of the journal entry discharging
56 the assignee of the case therein entitled, as the same appears in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of Winfield, this 2d day of June, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

STATE OF KANSAS, } ss:
*County of Cowley,* }

I, J. A. Burnette, judge of the 19th judicial district of said State, and presiding judge of the district court of said county, do hereby certify that Adams Staggers, by whom the above attestation was made, was, at the date thereof, clerk of said court, duly qualified, and that the same is in due form of law and made by the proper officer.

Dated June 2d, A. D. 1896.

J. A. BURNETTE, *Judge.*

STATE OF KANSAS, } ss:
*County of Cowley,* }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that Hon. J. A. Burnette, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof presiding judge of said court, duly commissioned, sworn and acting.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of Winfield, this the 2d day of June, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

Q. Do you remember the instance of the execution that the witness, J. W. Skinner, has testified about?

A. Yes.

Q. Do you know the condition of the assets of the Arkansas City Investment Company at that time?

57 A. Pretty well; yes.

Q. Do you know whether or not there were any assets which could have been subjected to that process then in the hands of the sheriff?

A. I don't think there was any from the information that I got from counsel.

Q. You have had a thorough knowledge of the condition of those assets from the time of the original assignment down to the present time, have you not?

A. Pretty well; yes.

Q. Since the making of the deed of assignment has the Arkansas City Investment Company transacted any business whatever to your knowledge?

A. No, sir; well, the company has not been transacting any business that I have any knowledge of.

Q. Has never been reorganized and has never resumed business?

A. No, sir.

Q. There will be nothing further then for distribution among the creditors of the Arkansas City Investment Company?

A. No, sir; there won't be anything. After the expenses are paid there won't be any money left.

Cross-examination read by DEFENDANT'S COUNSEL:

Q. Mr. Huey, did I understand you to say that when the Arkansas City bank sold out its business that the old company then retired from the banking business?

A. Yes.

Q. Who purchased the Arkansas City bank?

A. Well, there were two sales, really; the accounts were transferred to the First national bank and the furniture and safe and supplies were purchased by the Second Arkansas City bank, headed by Britton and Hartman.

Q. Was the bank business continued at the old banking-house of the Arkansas City bank?

A. Yes.

58 Q. Under what name was that continued?

A. That was continued under the Arkansas City bank.

Q. The banking business then continued under the name of the Arkansas City bank at the old stand?

A. I can't say that it continued because they did not commence business until a month after we transferred the accounts to the First national bank.

Q. When they did continue business they continued at the old stand of the Arkansas City bank and under that name?

A. Yes, sir.

—. And at the time that the Arkansas City Investment Company was operating and doing business here, the Arkansas City bank was also doing business?

A. Yes.

Redirect examination read by PLAINTIFF'S COUNSEL:

Q. The Arkansas City bank, that was also doing business, was a new and different institution altogether, wasn't it?

A. It was a new corporation with different men in it and different amount of capital, and incorporated June, 1889.

Q. It was not a continuation of the old Arkansas City bank, with which you were connected, was it?

A. No, sir; had nothing to do with it. It was not a continuation of the old Arkansas City bank.

Q. Was this new Arkansas City bank in any manner connected with the Arkansas City Investment Company?

A. Not at all; no way or shape.

Q. The Arkansas City Investment Company, that was a continuation of the old Arkansas City bank, as you have stated, did business at a different place also from the Arkansas City bank, did it not?

A. When the new Arkansas City bank was organized, the Arkan-

sas City Investment Company moved into other quarters out of the building.

59 Q. The second institution was then run in a different place?

A. They were.

Q. Managed by different men?

A. Yes, sir.

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the district court of Cowley county, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL: I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and, therefore, no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action.

Objection overruled. Exception by defendant. Judgment admitted in evidence and marked "Plaintiff's Exhibit 8" of this date.

PLAINTIFF'S EXHIBIT NO. 8.

STATE OF KANSAS, } ss:
*Thirteenth Judicial District, Cowley County,* }

Be it remembered, that on this 16th day of April, A. D. 1895, the same being the 13th judicial day of the regular April term, in the year 1895, of the district court of the thirteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, court convened pursuant to adjournment, there being present the Honorable A. M. Jackson, sole presiding judge of said court, Adam Staggers, clerk of said court, and J. W. Skinner, sheriff of said county.

60 Whereupon the following proceedings were had:

THE NATIONAL BANK OF OXFORD, PENNSYLVANIA, Plaintiff, *vs.* THE ARKANSAS CITY INVESTMENT COMPANY, Defendant. } No. 7399.

Now, on this day, the said plaintiff appearing by its attorneys, Troup & Brown, and the defendant appearing not, this cause comes regularly on for trial, and the parties appearing having waived the right to have the same heard and tried by a jury, it was heard and tried by the court. Thereupon the plaintiff introduces its evidence and rests its case, and the court on consideration thereof doth find that the said defendant has been duly, lawfully and personally served with summons of the pendency of this action, and has appeared herein and answered the petition of the plaintiff.

The court doth further find that the said defendant, The Arkansas City Investment Company is indebted to the plaintiff, The National Bank of Oxford, Pennsylvania, upon the promissory notes mentioned and set forth in the plaintiff's petition and sued on in this action in the sum of $3,449, with interest from this date, at the rate of ten per cent. per annum.

It is therefore considered, ordered, adjudged and decreed by the court that the National Bank of Oxford, Pennsylvania, do have and recover of and from the said defendant, The Arkansas City Investment Company, upon the promissory note sued on herein,
61 judgment in the sum of $3,449, with interest thereon at the rate of ten per cent. per annum from this date, together with the costs of this action now here taxed at $19.30, and therefor- let execution issue after ten days from this date.

Defendant's counsel then read in evidence a stipulation made in this action as follows:

"It is hereby stipulated and admitted that in the action in the district court within the State of Kansas, referred to in the complaint herein, and in the depositions taken by the plaintiff herein without the State of Kansas, no summons or other process was served upon the defendant, but the same was taken by the entry of appearance, a copy of which is embraced in the copy of the judgment of the National Bank of Oxford against the Arkansas City Investment Company, attached to the said depositions and now on file.

(Signed) HORNBLOWER, BYRNE & TAYLOR.
WILSON & WALLIS."

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the sheriff of Cowley county, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action.

Objection overruled. Exception by defendant. Execution admitted in evidence.

62 *Execution and Endorsement.*

UNITED STATES OF AMERICA, }
*State of Kansas, County of Cowley.* }

In the District Court of the Thirteenth Judicial District, Sitting in and for said County.

THE NATIONAL BANK OF OXFORD, PENNSYLVANIA, Plaintiff, *versus* THE ARKANSAS CITY INVESTMENT COMPANY, Defendant. } Execution.

The State of Kansas to the sheriff of Cowley county, in said State, Greeting:

Whereas, the National Bank of Oxford, Pennsylvania, on the 16th day of April, A. D. 1895, obtained judgment before the thirteenth judicial district court of the State of Kansas, within and for Cowley county, against the Arkansas City Investment Company, for the sum of thirty-four hundred forty-nine and $\frac{0}{100}$ ($3,449) dollars debt, and also for the sum of nineteen and $\frac{30}{100}$ ($19.30) dollars as costs in said behalf expended, with interest at the rate of 10 per cent. per annum, and there has accrued nine and $\frac{0}{100}$ ($9) dollars, and there has been paid, A. D. 18—, the sum of — dollars.

And whereas, there remains unpaid on such judgment the sum of thirty-four hundred, forty-nine and $\frac{0}{100}$ dollars, together with $19.30 costs; $9 accrued costs and interest and the accruing costs on this execution, less — paid as aforesaid:

63 Now, therefore, you are hereby commanded that of the goods and chattels of said The Arkansas City Investment Company, you cause the money above specified to be made, and for want of goods and chattels you cause the same to be made of the lands and tenements of said debtor and make return of this execution, with your certificate thereon, showing the manner you have executed the same within sixty days from the date hereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Winfield in said county, this 30th day of April, A. D. 1895.

ADAM STAGGERS,
[SEAL.] *Clerk of the District Court,*
By H. A. TONKINSON, *Deputy.*

*Sheriff's Return.*

Received this writ April 30, 1895.

After diligent search I cannot find any property whereon to levy this writ and therefor- return the same wholly unsatisfied.

J. W. SKINNER, *Sheriff,*
By IRA BARNETT, *Deputy.*

J. W. Skinner testified that there could not be found by the sheriff of the county of Cowley, in the State of Kansas, to whom the execution was directed, any property of the Arkansas City Investment Company whereon to levy such execution; that the sheriff exercised all possible diligence in endeavoring to find property and effects of the corporation whereon to levy; that he returned the execution wholly unsatisfied and before doing so entirely exhausted the assets and property of the Arkansas City Investment Company.

(Plaintiff rests.)

(Defendant rests.)

64 Plaintiff's counsel moves the court to direct a verdict for the plaintiff.

Defendant's counsel moves the court to direct a verdict for the defendant, upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, and the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas, and elsewhere is no judgment against the stockholder and is *res inter alios*. That the remedy provided by the Kansas statutes has no extraterritorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against a Kansas corporation, as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes and with the full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protections and safeguards shall be afforded to the defendant in pro-

65 ceedings brought in other States than Kansas, nor competent for the State of Kansas or its legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the State of New York, the jurisdiction of this court and that of the courts of New York State being concurrent, and the procedure being the same in both, in actions at common law; and that this action could not be main-

tained in the courts of New York State. That the alleged jurisdiction of the Kansas court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance, being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas court. That this court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The court denied defendant's motion, and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's motion for the direction of a verdict for defendant, and to the ruling of the court directing a verdict for the plaintiff.

Under the direction of the court the jury rendered a verdict for the plaintiff in the sum of $3,468.30, with interest at ten per cent., from April 16, 1895, amounting in all to the sum of $3,868.05.

66 Thereafter the court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted.

It is consented that the foregoing be settled and ordered on file as the defendant's bill of exceptions herein.

Dated October 14, 1896.

HORNBLOWER, BYRNES,
TAYLOR & MILLER,
*Plaintiff's Attorneys.*
WILSON & WALLIS,
*Defendant's Attorneys.*

Whereupon the foregoing is settled, signed and allowed by me as the defendant's bill of exceptions herein.

HOYT H. WHEELER,
*Circuit Judge.*

(Endorsed:) U. S. circuit court, southern district of N. Y. National Bank of Oxford against George L. Whitman. Defendant's bill of exceptions. Wilson & Wallis, att'ys for def't, 48 Wall St., N. Y. city. U. S. circuit court. Filed Dec. 3, 1896. John A. Shields, clerk.

67 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD
*against*
GEORGE L. WHITMAN.

Afterwards, to wit, on the 4th day of December, 1896, before the judges of the United States circuit court of appeals for the second

circuit, at the city of New York, in the State of New York, comes the said George L. Whitman, by Wilson & Wallis, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in the rulings and decisions and directions of the judge before whom the issues joined between the parties hereto were tried, as also in other respects and particulars, and especially in this, to wit:

(P. 10.) First. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. You may now state what was done by the stockholders and officers of the Arkansas City bank, with reference to the cessation of business as a bank, and the furtherance of other business.

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such
68 secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business, and wanted to have the use of the name of the Arkansas City bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question, and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings. Motion denied. Defendant excepts.

(P. 11.) Second. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. Was a copy of these proceedings made and furnished to the secretary of state of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

(P. 11.) Third. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offered in evidence a duly certified copy
69 from the office of the secretary of state of the State of Kansas of the proceedings of the stockholders of the Arkansas City bank, for the changing of its name certified by the secretary of the company and attested by the secretary of state of Kansas.

By DEFENDANT'S COUNSEL: "I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders; and, furthermore, that it is not in compliance with the requirements of the laws of Kansas."

Objection overruled. Defendant excepts.

Paper admitted in evidence and marked Plaintiff's Exhibit 3.

(P. 15.) Fourth. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. What was done with that paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the district court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, Pennsylvania.

70 (P. 16.) Fifth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 5.

(P. 17.) Sixth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 6.

(P. 19.) Seventh. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offered in evidence an order of the Kansas

court, discharging the assignee of the Arkansas City Investment Company.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked Plaintiff's Exhibit 7.

71 (P. 22.) Eighth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the district court of Cowley county, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL: "I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action."

Objection overruled. Exception by defendant.

Judgment admitted in evidence and marked Plaintiff's Exhibit 8.

(P. 23) Ninth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the sheriff of Cowley county, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action. Objection overruled. Exception by defendant.

Execution admitted in evidence.

72 (P. 24.) Tenth. That said judge on said trial refused to direct a verdict for the defendant, and directed a verdict for the plaintiff as follows:

Plaintiff's counsel moves the court to direct a verdict for the plaintiff. Defendant's counsel moves the court to direct a verdict for the defendant upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, and the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas and elsewhere, is no judgment against the stockholder, and is *res inter alios*. That the remedy provided by the Kansas statutes has no extraterritorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against

a Kansas corporation as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation, were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes, and with the
73 full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protections and safeguards shall be afforded to the defendant in proceedings brought in other States than Kansas, nor competent for the State of Kansas or its legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the State of New York, the jurisdiction of this court and that of the courts of New York State being concurrent, and the procedure being the same in both in actions at common law; and that this action could not be maintained in the courts of New York State. That the alleged jurisdiction of the Kansas court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas court. That this court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The court denied defendant's motion and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's
74 motion for the direction of a verdict for defendant and to the ruling of the court directing a verdict for the plaintiff.

(P. 26.) Eleventh. That the jury upon said trial under the direction of the said judge rendered a verdict for the plaintiff, and such verdict was contrary to the evidence in the case.

(P. 26.) Twelfth. That the jury upon said trial under the direction of the said judge rendered a verdict for the plaintiff, and such verdict was contrary to law.

(P. 26.) Thirteenth. That the said judge upon the conclusion of said trial refused to set aside the said verdict and directed judgment thereon as follows:

Therefore the court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted.

And the said George L Whitman prays that the judgment aforesaid may be reversed and altogether held for naught and that he may be restored to all things which he has lost by reason of the said judgment, &c.

WILSON & WALLIS,
*Attorneys and of Counsel for Plaintiff in Error.*

(Endorsed:) U. S. circuit court, southern district of N. Y. National Bank of Oxford ag'st George L. Whitman. Assignment of errors. Wilson & Wallis, def't's att'ys, 48 Wall St., N. Y. city. U. S. circuit court. Filed Dec. 4, 1896. John A. Shields, clerk.

75 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NATIONAL BANK OF OXFORD, Plaintiff, *vs.* GEORGE L. WHITMAN, Defendant. } Bond for Damages and Costs.

Know all men by these presents, that we, George L. Whitman, residing at No. 7 East Forty-fourth street in the city of New York, as principal, and the American Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the above-named National Bank of Oxford in the sum of five thousand dollars, to be paid to the said National Bank of Oxford, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the third day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, the above-named George L. Whitman has prosecuted a writ of error to the United States circuit court of appeals, for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York;

76 Now, therefore, the condition of this obligation is such, that if the above-named George L. Whitman shall prosecute the said writ to effect and answer all damages and costs, if George L. Whitman fails to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. L. WHITMAN. [SEAL.]
AMERICAN SURETY CO. OF NEW YORK.
DAVID B. SICKELS, *2d Vice-President.*
CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sealed and delivered and taken and acknowledged this 4th day of December, 1896, before me,

L. E. CARMAN,
[SEAL.] *Notary Public, New York Co.*

Certs. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co.'s.

SOUTHERN DISTRICT OF NEW YORK, } ss:
*State, City, and County of New York,* }

On this 4th day of December, 1896, before me personally appeared David B. Sickels, 2d vice-president of the American Surety Company of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the city of New York, that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and that he signed said instrument as 2d vice-president of said company by like authority; and that the liabili-
77 ties of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893. And the said David B. Sickels, further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said company; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of trustees, and in the presence of him the said David B. Sickels, 2d vice-president.

WM. H. BISHOP,
*Notary Public* (206), *New York Co.*

Certs. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co.'s.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

78 SOUTHERN DISTRICT OF NEW YORK, } ss:
*City and County of New York,* }

—, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said

company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 4th day of December, 1896.

[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

(Cut.)

Incorporated April 14, 1884

American Surety Company of New York. General offices, 100 Broadway.

*Financial Statement, December* 31, 1895.

| | | |
|---|---|---|
| Resources: | | |
| Real estate and improvements | $3,152,175.52 | |
| Less payables | 100,000.00 | |
| | | $3,052,175 52 |
| United States registered bonds | | 445,000 00 |
| Other stocks and bonds | | 662,526 25 |
| First liens and mortgages owned | | 323,909 99 |
| Mortgage loans and bills receivable | | 115,623 76 |
| Accrued interest and dividends | | 42,444 89 |
| Cash in banks and offices | | 84,407 44 |
| Premiums in course of collection | | 149,840 06 |
| | | $4,875,927 91 |
| 79 Liabilities: | | |
| Capital stock | | $2,500,000 00 |
| Surplus | | 1,000,000 00 |
| Undivided profits | | 568,522 74 |
| Premium reserve requirement | | 568,999 06 |
| Claims in process of adjustment | | 224,269 09 |
| Collateral and trust funds | | 14,137 02 |
| | | $4,875,927 91 |

SOUTHERN DISTRICT OF NEW YORK, } ss:
*City and County of New York,* }

Cortlandt S. Van Rensselaer, being duly sworn, deposes and says: That he is one of the attorneys of the American Surety Company of New York, and that the foregoing is a true and correct statement of the financial condition of said surety company, as of December 31, 1895, to the best of his knowledge and belief.

CORTLANDT S. VAN RENSSELAER.

Sworn to before me this 4th day of December, 1896.

WM. H. BISHOP,

[SEAL.] *Notary Public* (206), *New York County.*

Approved:

HORNBLOWER, BYRNE & TAYLOR,
*Solicitors for Plaintiff.*

New York, December 4, 1896.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The National Bank of Oxford ag'st George L. Whitman. Bond for damages and costs. Wilson & Wallis, att'ys for def't, 48 Wall St., N. Y. city. Approved and allowed Dec. 4, 1896. E. Henry Lacombe, circuit judge. U. S. circuit court. Filed Dec. 4, 1896. John A. Shields, clerk.

80 THE UNITED STATES OF AMERICA, *ss*:

To the National Bank of Oxford, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the second circuit, to be holden at the city of New York, on the second day of January, 1897, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George L. Whitman is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated December 4, 1896.

E. HENRY LACOMBE,
*U. S. Circuit Judge.*

(Endorsed:) U. S circuit court of appeals. George L. Whitman, pl'ff in error, ag'st National Bank of Oxford, def't in error. Citation. Wilson & Wallis, att'ys for pl'ff in error, 48 Wall St., N. Y. city. Due service of copy of the within citation is hereby admitted this 8th day of Dec., 1896. Hornblower, Byrnes & Taylor, att'ys for def't in error. U. S. circuit court. Filed Dec. 9, 1896. John A. Shields, clerk.

81 U. S. Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
*against*
NATIONAL BANK OF OXFORD, Defendant in Error.

It is hereby stipulated that a copy of the entry of appearance referred to in the stipulation upon page 61 of the Transcript of Record herein, which was accidentally omitted in making up and printing the record, may be now printed and inserted at the proper place therein as part of such record, and that an order may be entered herein to that effect.

Dated New York, April 17, 1897.

HORNBLOWER, BYRNE & TAYLOR,
*Counsel for Defendant in Error.*
WILSON & WALLIS,
*Counsel for Plaintiff in Error.*

(Endorsed:) United States circuit court of appeals, second circuit. Filed Apr. 17, 1897. James C. Reed, clerk.

82 In the District Court of Cowley County, Kansas.

THE NATIONAL BANK OF OXFORD, Pennsylvania, Plaintiff,
*vs.*
THE ARKANSAS CITY INVESTMENT COMPANY, Defendant.
} Entry of Appearance.

Comes now the said defendant, The Arkansas City Investment Company, and enters its appearance herein and waives the issuance of process and service of summons upon it, and submits to the jurisdiction of this court in this cause for all of the purposes of this suit.

The said defendant, however, reserves the right to answer or plead herein on or before the 14th day of January, A. D. 1895.

THE ARKANSAS CITY INVESTMENT COMPANY,
By J. L. HUEY, *Cashier and Managing Officer.*

83 United States Circuit Court of Appeals for the Second Circuit, October Term, 1896.

Submitted May 25, 1897; decided July 21, 1897.

GEORGE L. WHITMAN, Plaintiff in Error,
*vs.*
THE NATIONAL BANK OF OXFORD, Defendant in Error.
} No. 135.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

The constitution of the State of Kansas provided, prior to the year 1866, and still provides, in section 2 of article XII, as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of chapter 23 of the General Statutes of Kansas of 1868, section 40 of the same chapter, as amended in 1883, and section 44 of the same chapter, which are still the statutes of the State, provided as follows:

SECTION 32. "If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount
84 to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue

against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40, as amended: "A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

SECTION 44. "If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real-estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

| | | |
|---|---|---|
| George L. Whitman, | New York city, | 1,000 shares. |
| Samuel Newell, | " " " | 649 " |
| James L. Huey, | Arkansas City, | 349 " |
| Mary L. Newell, | New York city, | 1 " |
| Mary E. Huey, | " " " | 1 " |

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December 1890 it made a general assignment for the benefit of its creditors and from that time completely suspended its business, and thereafter at the expiration of one year was deemed to be dissolved under the provisions of section 40 for the purpose of enabling its creditors to sue its stock-

holders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff, The National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time but, in 1895, the plaintiff duly obtained judgment against the bank, in a State court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the circuit court for the southern district of New York, against the defendant, George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank.

The complaint in the action alleged all the foregoing facts.
86 The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, *Circuit Judge:*

It will be observed, that the complaint contains the averments which are required either by section 32 or section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was based, such as the guaranty, the discount and the non-payment were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established, against the stockholders, the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single

stockholder who was a resident of such State, has already been stated.

87 It is to be premised, as was clearly shown by Justice Clifford, in *Morley vs. Thayer* (3 *Fed. Rep.*, 739), with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect. *Grover vs. Slaughter* (15 *Pet.*, 449); *Wells vs. Robb* (43 *Kan.*, 201). It is also to be premised, as stated in *Pollard vs. Bailey* (20 *Wall.*, 520), and reaffirmed in *Fourth National Bank vs. Francklyn* (120 *U. S.*, 747), that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but when the provision for a liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court, which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest court of Kansas, and because they show the particulars in this class of statutes which the Supreme Court regards as especially significant upon the question of construction.

The case of *Flash vs. Conn* (109 *U. S.*, 371), was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The court after saying that great, if not conclusive, weight must be given to the construction which the highest court of New York had placed upon the statute, and that following such construction the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the court said: "Lastly, it is objected that the dec-

88 laration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the case of *Pollard vs. Bailey* (20 *Wall.*, 520), *Terry vs. Tubman* (92 *U. S.*, 156), to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity.

But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execu-

tion thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State courts, but in *Huntington vs. Attrill* (146 *U. S.* 657) the Supreme Court stated its position in regard to the duty of a court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordance with the obiter remarks of the justice who delivered the opinion of the court in *Steam Engine Co. vs. Hubbard* (101 *U. S.*, 188, 192). The *Huntington case* grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The court said "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil
89 remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholder's obligation, and whether it was several or joint, definite, or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial Laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual liability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of section 14, chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." The supreme court of Kansas in *Grand vs. Tucker* (5 *Kan.*, 70) held that "under this statute, a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The court thus anticipated the decision in *Flash vs. Conn*, regarded "each stockholder as individually liable for the debts of the company to an amount equal to

the amount of his stock," rejected the idea of a proportionate
90 liability or a *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In *Hentig vs. James* (22 *Kan.*, 326) the Kansas court, in discussing the mode of procedure under section 32, said that the creditor has two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of the judgment against the corporation, but said nothing either in favor of or against the exclusive jurisdiction of the Kansas court over the second mode of procedure.

In *Howell vs. Mangelsdorf* (33 *Kan.*, 194) the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial court to grant such a motion came before the supreme court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further said that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to enforce the same is transitory," citing *Flash vs. Conn, supra.* It is true that this language is obiter in the sense that it was not absolutely necessary to the decision of the question before the court, which was, whether by notice to a non-resident, the Kansas court could order execution to issue against him; but it clearly stated the theory of the court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not obiter, because it answered the argument that the liability of non-resident stock-
91 holders must be enforced by notice and the levy of an execution, or was not enforceable, and that therefore in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action, is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas court in *Abbey vs. Dry Goods Co.* (44 *Kan.*, 415), is important. The case was under section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The court held that the liability of stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and the decision of the Missouri court of appeals upon the same subject, *Perry vs. Turner* (55 *Missouri*, 418), and the decisions in *Bank of*

*Poughkeepsie vs. Ibbotson* (24 *Wend.*, 473), and *Paine vs. Stewart* (33 *Conn.*, 516), upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the *Howell case*, in regard to the character of the stockholders' liability and of the creditors' remedy under section 32 are manifest. The means which the statutes provided to enforce the individual constitutional liability, determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (*Flash vs. Conn, supra.*) Section 32 has thus, by the decisions of the State court, the indicia of a transitory action, and although these indicia might be overcome by a manifest intent of the legislature
92 that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the *Howell case, supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided, one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceeding looks eventually towards a proportionate division among them. It does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that, in *Bank of North America vs. Rindge* (154 *Mass.*, 203), which was a suit in Massachusetts to enforce the provisions of section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but, it is also true, that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the court was unable to decide whether the statute authorized an
93 action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the

laws of Kansas above set forth, are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us." But in *Hancock Bank vs. Ellis* (166 *Mass.*, 414) the pleader was more careful and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder, the court said, "A declaration which sets forth that according to the law of Kansas, the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good," and further that "jurisdiction exists here (in Mass.) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the courts of Massachusetts have not yet stated their own opinion upon the statute in question. In *Fowler vs. Lamson* (146 *Illinois*, 472) the plaintiff had recovered a judgment against a Kansas corporation before the superior court of Cook county, Illinois, an execution had been issued upon that judgment which was returned unsatisfied, and the plaintiff then brought a bill in equity in the courts of Cook county, against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In *Tuttle vs. National Bank of the Republic* (161 *Illinois*, 497) the question upon the Kansas statute came before the court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven judges dissenting.

In *Marshall vs. Sherman* (148 *N. Y.*, 9) the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not in-
94 cluded. The constitution and statutes of Kansas were fully set out in the complaint, but the judge who spoke for the court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the courts of Kansas, and that therefore the court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the court was of opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the court in the *Rindge case*, *supra*, the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the

stockholder to creditors (*Guerney vs. Moore* (131 *Missouri*, 650) the argument is simply one against the expediency of the statute.

The decisions in the Federal courts which affirm the jurisdiction of Federal courts in other States to enforce this particular statute of Kansas are *Bank of North America vs. Rindge* (57 *Fed. Rep.*, 279), *Rhodes vs. U. S. National Bank* (66 *Fed. Rep.*, 512), *McVicker vs. Jones* (70 *Fed. Rep.*, 754). Decisions, in addition to those already cited, in favor of jurisdiction of courts of foreign States to enforce similar or analogous State statutes, are *Paine vs. Stewart* (33 *Conn.*, 516), *Cuykendall vs. Miles* (10 *Fed. Rep.*, 342), *Auer vs. Lombard* (72 *Fed. Rep.*, 209).

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas court did not acquire jurisdiction to render judgment against the corporation, because the cashier made a voluntary appearance and waived
95 the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney-at-law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder. *Tenny vs. Townsend*, (9 *Blatchf.*, 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken away with him by the president "when he left" in May or June 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and section 12 of chapter 23 of the General Statutes of 1868, provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the secretary of state an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the secretary of state was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the circuit court is affirmed, with costs.

*William G. Wilson* and *Joseph H. Choate*, for the plaintiff in error.

*William B. Hornblower*, for the defendant in error.

96 UNITED STATES OF AMERICA, }
*Southern District of New York*, } *ss.*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 95, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George L. Whitman, plaintiff in error, against The Na-

tional Bank of Oxford, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of October, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

97 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is made within having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is annexed hereto, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 3rd, 1897.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

98 U. S. Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
*against*
NATIONAL BANK OF OXFORD, Defendant in Error.

It is hereby stipulated by and between the parties hereto that the certified transcript of the record of the proceedings in this court herein, which is now on file in the office of the clerk of the Supreme Court of the United States, shall be taken as a due and sufficient return to the writ of certiorari issued herein on October 26, 1897, out of said Supreme Court of the United States, directed to the judges of the United States circuit court of appeals for the second circuit, requiring the record and proceedings in this cause to be transmitted to the said Supreme Court for its action.

Dated New York, October 28th, A. D. 1897.

WILLIAM G. WILSON,
*Counsel for Plaintiff in Error, Petitioner.*
WM. B. HORNBLOWER,
HOWARD A. TAYLOR,
*Counsel for Defendant in Error, Respondent.*

A true copy.
WM. PARKIN, *Clerk.*

99 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which George L. Whitman is plaintiff in error and The National Bank of Oxford is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
100 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

[Endorsed:] Case No. 16,695. Supreme Court of the United States. No. 182. October term, 1898. George L. Whitman *vs.* The National Bank of Oxford. Writ of certiorari and return. Office Supreme Court U. S. Filed Nov. 5, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,695 U. S. C. C. of appeals, 2nd circuit. Term No., 182. George L. Whitman, petitioner, *vs.* The National Bank of Oxford. Filed October 16, 1897.

4 8 2 1897 182

Supreme Court, U.S.
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JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE L. WHITMAN,
*Petitioner,*

*vs.*

NATIONAL BANK OF OXFORD,
*Respondent.*

## Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
*Of Counsel for Petitioner.*

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.—*Ex Parte* GEORGE L. WHITMAN, Petitioner.

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Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of George L. Whitman, plaintiff in error, versus National Bank of Oxford, defendant in error.

To the Honorable the Supreme Court of the United States:

The petition of George L. Whitman, plaintiff in error, respectfully shows to this Honorable Court as follows:

First. Your petitioner is a citizen of the United States, residing in the City and State of New York.

Second. On or about May 29, 1895, the National Bank of Oxford brought an action in the Circuit Court of the United States, for the Southern District of New York, against your petitioner upon the cause of action hereinafter stated; and in its complaint therein said National Bank of Oxford alleged that your petitioner was a stockholder of a certain corporation of the State of Kansas known as the Arkansas City Investment Company, and was, as such stockholder, liable to the plaintiff, said National Bank of Oxford, for the amount of a judgment alleged to have been theretofore recovered by said National Bank of Oxford against the said Kansas corporation in a court of the State of Kansas; and the relief demanded in said action against your petitioner was a judgment against him for the amount of the said judgment of the said Kansas Court against said Kansas corporation, with interest thereon and costs. Said complaint set forth said provisions of the Constitution and Statutes of the State of Kansas as fixing the liability of your petitioner to action

and recovery thereunder in said Circuit Court of the United States for the Southern District of New York.

THIRD. Your petitioner answered the said complaint and among other defenses thereto maintained in his said answer that said Circuit Court of the United States for the Southern District of New York had not jurisdiction of the subject of the action or of the subject of the cause of action alleged in said complaint, and that the said complaint did not state facts sufficient to constitute a cause of action.

FOURTH. Thereafter the issues raised by said complaint and answer were brought to trial before the Honorable HOYT H. WHEELER and a jury in said Circuit Court of the United States, on June 10, 1896; and thereupon, at the close of such trial, after the taking of oral and documentary evidence, both parties having rested, a verdict was directed in favor of said National Bank of Oxford against your petitioner, for the amount of said Kansas judgment against said Kansas corporation, and interest thereon and costs of said action in the Circuit Court of the United States, to which direction and action of the Court said petitioner duly excepted.

FIFTH. Thereafter your petitioner made a motion to set aside the said verdict, which motion was denied, your petitioner duly excepting to such denial, and judgment was thereupon entered in favor of said National Bank of Oxford against your petitioner for $4,205.48, with interest thereon at the rate of ten per cent. per annum.

SIXTH. Thereafter your petitioner made up his bill of exceptions to review such judgment and proceedings, and took out a writ of error to review the same; and such writ of error was thereafter brought before the United States Circuit Court of Appeals for the Second Circuit, and argument having been had thereon said Circuit Court of Appeals thereafter rendered a decision for the affirmance of the judgment of said United States Circuit Court, which decision is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL BANK OF OXFORD

v.

GEORGE L. WHITMAN.

The Constitution of the State of Kansas provided, prior to the year 1866, and still provides, in Section 2 of Article XII., as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law, but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of Chapter 23 of the General Statutes of Kansas of 1868, Section 40 of the same chapter, as amended in 1883, and Section 44 of the same chapter, which are still the statutes of the State, provided as follows:

"SECTION 32. If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SECTION 40 (as amended): A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business."

"SECTION 44: If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City Bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

| | |
|---|---|
| George L. Whitman, New York City | 1,000 shares. |
| Samuel Newell, " " " | 649 " |
| James L. Huey, Arkansas City | 349 " |
| Mary L. Newell, New York City | 1 " |
| Mary E. Huey, " " " | 1 " |

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December, 1890, it made

a general assignment for the benefit of its creditors, and from that time completely suspended its business, and thereafter, at the expiration of one year, was deemed to be dissolved under the provisions of Section 40 for the purpose of enabling its creditors to sue its stockholders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff the National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time; but, in 1895, the plaintiff duly obtained judgment against the bank, in a State Court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the Circuit Court for the Southern District of New York against the defendant George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank. The complaint in the action alleged all the foregoing facts. The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The Court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, C. J.:

It will be observed, that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was

based, such as the guaranty, the discount and the nonpayment, were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established against the stockholders the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the Constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single stockholder who was a resident of such State, has already been stated.

It is to be premised, as was clearly shown by Justice CLIFFORD in Morley vs. Thayer, 3 Fed. Rep., 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect (Grover vs. Slaughter, 15 Pet., 449; Wells vs. Robb, 43 Kan., 201). It is also to be premised, as stated in Pollard vs. Baily, 20 Wall., 520, and reaffirmed in Fourth National Bank vs. Francklyn, 120 U. S., 747, that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, when the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest Court of Kansas, and because they show the particulars in this class of statutes, which the Supreme Court regards as especially significant upon the question of construction.

The case of Flash vs. Conn, 109 U. S., 371, was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The Court, after saying that great, if not conclusive, weight must be given to the construction which the

highest Court of New York had placed upon the statute, and that, following such construction, the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the Court said: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard vs. Bailey, 20 Ward, 520; Terry vs. Tubman, 92 U. S., 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the Court held, could only be done by a suit in equity.

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out an execution thereon which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State Courts; but, in Huntington vs. Attrill, 146 U. S., 657, the Supreme Court stated its position in regard to the duty of a Court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordance with the obiter remarks of the Justice who delivered the opinion of the Court in Steam Engine Co. vs. Hubbard, 101 U. S., 188, 192. The Huntington case grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The Court said: "As the statute imposes a burdensome liability on the officers for their wrongful act it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the

creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground on principle for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest Court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholders' obligation, and whether it was several or joint, definite or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual lability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of Section 14, Chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts and responsibilities of the company." The Supreme Court of Kansas in Grund vs. Tucker, 5 Kan., 70, held that "under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The Court thus anticipated the decision in Flash vs. Conn, regarded "each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock," rejected the idea of a proportionate liability or *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In Hentig vs. James, 22 Kan., 326, the Kansas Court, in discussing the mode of procedure under Section 32, said that the creditor had two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of judgment against the corporation, but said noth-

ing either in favor of or against the exclusive jurisdiction of the Kansas Court over the second mode of procedure.

In Howell vs. Mangelsdorf, 33 Kan., 194, the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the Court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial Court to grant such motion came before the Supreme Court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further says that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory," citing Flash vs. Conn, *supra*. It is true that this language is *obiter* in the sense that it is not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution, or was not enforceable, and that, therefore, in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas Court in Abbey vs. Dry Goods Co., 44 Kan., 415, is important. The case was under Section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The Court held that the liability of the stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and

the decision of the Missouri Court of Appeals upon the same subject (Perry vs. Turner, 55 Missouri, 418) and the decisions in Bank of Poughkeepsie vs. Abbotson, 24 Wend., 473, and Paine vs. Stewart, 33 Conn., 516, upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the Howell case, in regard to the character of the stockholders' liability and of the creditors' remedy under Section 32, are manifest. The means which the statutes provided to enforce the individual constitutional liability determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (Flash vs. Conn., *supra.)* Section 32 has thus by the decision of the State Court, the *indicia* of a transitory action, and although these *indicia* might be overcome by a manifest intent of the legislature that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the Howell case, *supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided—one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and, if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under Section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceedings looks eventually towards a proportionate division among them. It

does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under Section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that in the Bank of North America vs. Rindge, 154 Mass., 203, which was a suit in Massachusetts to enforce the provisions of Section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but it is also true that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the Court was unable to decide whether the statute authorized an action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the Courts of that State. But we must take the case as the parties present it to us." But in the Hancock Bank vs. Ellis, 166 Mass., 414, the pleader was more careful, and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder the Court said: "A declaration which sets forth that according to the law of Kansas the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good;" and, further, that "jurisdiction exists here (in Massachusetts) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the Courts of Massachusetts have not yet stated their own opinion upon the statute in question. In Fowler vs. Lamson, 146 Illinois, 472, the plaintiff had recovered a judgment against a Kansas corporation before the Superior Court for Cook County, Illinois, an execution had been issued upon that judgment, which was returned unsatisfied, and the plaintiff then brought a bill in equity in the Courts of Cook County against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In Tuttle vs. National Bank of the Republic, 161 Illinois, 497, the question upon the Kansas statute came before

the Court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven Judges dissenting.

In Marshall vs. Sherman, 148 N. Y., 9, the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not included. The constitution and statutes of Kansas were fully set out in the complaint, but the Judge who spoke for the Court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the Court of Kansas, and that therefore the Court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the Court was of the opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State Courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the Court (Rindge case, *supra*), the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the Courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the stockholder to creditors (Guerney vs. Moore, 131 Missouri, 650), the argument is simply one against the expediency of the statute.

The decisions in the Federal Courts which affirm the jurisdiction of Federal Courts in other States to enforce this particular statute of Kansas are Bank of North America vs. Rindge, 57 Fed. Rep., 279; Rhodes vs. U. S. National Bank, 66 Fed. Rep., 512; McVickar vs. Jones, 70 Fed. Rep., 754. Decisions in addition to those already cited, in favor of jurisdiction of foreign Courts of foreign States to enforce similar or analogous State statutes, are Paine vs. Stewart, 33 Conn., 516; Cuykendall vs. Miles, 10 Fed. Rep., 342; Auer vs. Lombard, 72 Fed. Rep., 209.

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas Court did not acquire jurisdiction to render judg-

ment against the corporation, because the cashier made a voluntary appearance and waived the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney at law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder (Tenney vs. Townsend, 9 Blatchf., 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken with him by the president "when he left" in May or June, 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and Section 12 of Chapter 23 of the general statutes of 1869 provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such changes was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the Secretary of State was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the Circuit Court is affirmed with costs.

WILLIAM B. HORNBLOWER and HOWARD A. TAYLOR, for the plaintiff (defendant in error).

JOSEPH H. CHOATE and WM. G. WILSON, for the defendant (plaintiff in error).

[ENDORSED:] U. S. Circuit Court of Appeals, for the Second Circuit.—National Bank of Oxford vs. George L. Whitman. Opinion, SHIPMAN, C. J.—United States Circuit Court of Appeals, Second Circuit. Filed Jul. 21, 1897, William Parkin, Clerk.

SEVENTH. A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals.

EIGHTH. Your petitioner is advised and believes that the said decision and judgment of the said United States Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

NINTH. The issues presented the questions, among others, of the nature and extent of the individual liability of a stockholder in a Kansas corporation for the debts of the corporation, and the power of the legislature of Kansas to establish new forms of procedure for courts outside the territorial limits of that State.

It was maintained on behalf of the defendant that the liability was purely statutory—*Morley vs. Thayer*, 3 Fed., 739; *Wells vs. Robb*, 43 Kan., 201; that the statute contained no declaration whatever of general liability, and whatever liability it created was an inference from the remedy which it provided; and that, as was said in *Pollard vs. Bailey*, 20 Wall., 520, "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The present case was clearly one falling within this rule. The Kansas statute did not create a general liability without a remedy, so as to permit the enforcement of such liability by an appropriate common-law action; but, on the contrary, the provision for the liability is not only coupled with a provision for a special remedy, but exists solely by virtue of the provision for a special remedy.

The special remedy is twofold. After judgment has been recovered against the Kansas corporation, and execution thereon has been returned unsatisfied, then the Court may, on notice, make an order that execution on the same judgment be issued against any of the stockholders "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon;" "or the plaintiff in the execution may proceed

by action to charge the stockholders with the amount of his judgment."

The present action rests on this auhoritty only. It is an action to charge George L. Whitman, as a stockholder of the Arkansas City Investment Company, with the amount of the judgment recovered by the National Bank of Oxford against the Arkansas City Investment Company.

It was maintained on behalf of defendant that such a remedy, being purely a creation of the Kansas statute, could only be reesortd to within the territorial limits of the State of Kansas; that it was unknown to the common law and unknown to the Circuit Court of the United States for the Southern District of New York, and that it was not competent for the legislature of Kansas to prescribe new remedies to be administered by Courts without the State of Kansas.

This is the doctrine substantially held by the highest courts of three of the States: *Bank of North America vs. Pindge*, 154 Mass., 203; *Marshall vs. Sherman*, 148 N. Y., 9; *Fowler vs. Samson*, 146 Ill., 472; *Tuttle vs. Nat. Bank of Republic*, 161 Ill., 497.

TENTH. While it is true, as a general rule, that the courts of the United States will follow the construction which the highest courts of the several States have put upon the statutes of their respective States, this general rule must be taken with two qualifications to which it is essential that full recognition should be given in the consideration of the questions here presented. These qualifications are:

1. Such construction must form part of an actual decision by the State Court of an issue presented for decision by the case before it.

2. The issue presented must be of such character that the State Court is authorized to pass final and authoritative judgment upon it.

No one will question these propositions in the abstract. If the question upon which the State Court assumes to pass judgment is not a question presented by the case before it, or is a question which it is not within the power of the State Court to determine, the action of the Court is equally *coram non judice*.

Applying this to the present case, we find:

1. The decision of the Circuit Court of Appeals is founded

upon the assumed decision of the Supreme Court of Kansas in the case of *Howell vs. Mangelsdorf*, 33 Kan., 194, wherein that Court used the following language: "This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State, where personal service can be made on the stockholder." But, in fact, this language was no part of the decision of the matter before the Supreme Court of Kansas, and was a mere *dictum*.

It is well settled in the rulings of this Court, as stated in *Carroll vs. Carroll*, 16 Howard, 286, by Mr. Justice CURTIS: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore, this Court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Virginia*, 6 Wheat., 399, this Court was much impressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be received, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte Christie*, 3 How., 292, and *Jenness et al. versus Peck*, 7 How., 612, are an illustration of the rule that any opinion

given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

In *Howell vs. Mangelsdorf*, the plaintiff had obtained a judgment in the Kansas Court against the Kansas corporation, and had then resorted to the first of the two alternative remedies provided by the Kansas statute—that is, to a motion for an order that an execution issue upon that judgment against an individual stockholder of the Kansas corporation. The notice of the motion was served upon the stockholder outside the territorial limits of the State of Kansas; and the sole question presented was, whether such service without the State conferred jurisdiction upon the Kansas Court to make the order for the issue of execution against the stockholder. The Court decided the question thus presented, by holding that service of notice without the State did not confer upon it jurisdiction to order the execution, and denied the motion on the ground of want of jurisdiction to grant it.

And that was all that the Kansas Court could decide, upon the question before it. If, by any possibility, the question whether the second of the two alternative remedies provided by the Kansas statute—that is, an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment—was maintainable without the State of Kansas, could have come before the Kansas Court, it certainly was not then before the Kansas Court, for no such action had been attempted. The sole question was whether service of notice of motion for execution without the State conferred jurisdiction upon the Kansas Court, and that Court held that it did not. Having decided itself to be without jurisdiction, the Kansas Court had no possible jurisdiction to go on and determine other questions which were not before it.

And yet it is upon the assumed decision of the Kansas Court, as to the jurisdiction of Courts of other States, in actions which might be brought therein to charge stockholders there with Kansas judgments against their corporations, that all the authority for the present determination of the CircuitCourt of Appeals rests. The cases of *Bank of North America vs. Rindge*, 57 Fed., 279; *Rhodes vs. United States National Bank*, 66 Fed., 512; *McVicker vs. Jones*, 70 Fed., 574, which are put forward as precedents for the decision in the present case, rest only on the assumed authority of *Howell vs. Mangelsdorf* as being the authoritative decision of the Kansas Court upon the precise question presented here.

II. If the question had been presented to the Kansas Court, it could not have been competent for that Court to have determined what jurisdiction the Courts outside of Kansas might entertain to enforce the remedy of an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment.

It is a fundamental proposition that each court is the judge of its own jurisdiction. Any other rule would lead to chaos.

If the Kansas Legislature may pass statutes, and the Kansas courts may decide, as general principles of law, binding upon parties not before them, that the Kansas statutes are to be enforced by courts without the State of Kansas, whether State courts or Federal courts, then the Legislature of Kansas can, in effect, legislate for the whole of the United States, and the Legislature of every other State can do the same. New remedies, new forms of action may be devised, and while the State courts may decline to exercise the jurisdiction, the courts of the United States are bound to do so; and the rights of each citizen will depend, not on well-settled principles and forms of procedure, but on the accident of citizenship in the same State, or diversity of citizenship, between the plaintiff and the defendant.

The present case is a forcible illustration. Your petitioner cannot be sued upon the cause of action here asserted, in any action brought in the courts of New York, because those courts do not recognize the power of the Legislature and courts of Kansas to impose upon him without that State the form of remedy sought to be enforced. But he is exposed to liability upon the same cause of action in the courts of the United States whenever the plaintiff is fortunate enough to be a citizen of another State than New York. If your petitioner were a citizen of the State of Pennsylvania, then he would be secure against any suit which the National Bank of Oxford might bring, but would be exposed to attack by a citizen of New York, who cannot attack him now.

The courts of Kansas have no authority to determine the powers and functions of the courts outside the limits of Kansas, and cannot by any decision of theirs, under the guise of construing a State statute, confer or impose jurisdiction without those limits, any more than the Legislature of Kansas could do the same thing by statutes containing an express declaration to the like effect.

If the Kansas statute had said upon its face, and in express terms, that any plaintiff in a Kansas judgment and execution

against a Kansas corporation might maintain an action in any court of any other State, or any court of the United States wherever situated, to charge a stockholder with the judgment in Kansas against the corporation, it can hardly be that such an enactment would be held binding outside the State of Kansas. The Circuit Court of the United States for the Southern District of New York might well say that it did not derive its jurisdiction from the Legislature of Kansas, but that its forms of remedy and procedure were derived from the Acts of Congress, among which is that instructing it to follow the common law practice and procedure of the State of New York. And yet here we have the same Circuit Court of the United States for the Southern District of New York entertaining a novel jurisdiction and enforcing a new form of action in obedience to a *dictum* of a Kansas Court which has assumed to declare that the Kansas Legislature intended as much in and by a statute which says nothing of the kind.

The form of action is one unknown to the common law. No such action is known to the common law as one to charge a stockholder individually with a judgment against his corporation. The remedy is novel; under the authority of *Pollard vs. Bailey (supra)*, the remedy is exclusive; and it is the remedy which has been resorted to and assumed to be enforced in the present case; an action to charge B with a judgment against A, recovered in a foreign jurisdiction in a suit to which B was a stranger.

ELEVENTH. Your petitioner is informed and believes that the questions here presented are of great importance and of wide reaching effect; that the decisions of the highest courts of several of the States and especially those of Massachusetts, New York and Illinois, are in direct conflict with that of the Circuit Court of Appeals for the Second Circuit, which your petitioner now asks to have reviewed; and that a very large number of actions, involving in the aggregate very large sums of money, and presenting the same questions here presented, are now pending in the courts of various States and in various courts of the United States; and that it is matter of great public interest and importance that such question should be heard and passed upon and determined by your Honorable Court, to the end that the law controlling the same and the constitutional principles involved should be finally settled and established.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled George L. Whitman, plaintiff in error, against The National Bank of Oxford, to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act af Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said act, and that the said determination of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

GEORGE L. WHITMAN.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, } ss. :
City and County of New York, }

GEORGE L. WHITMAN, being duly sworn, says that he is the petitioner named in the foregoing petition, which has been signed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE L. WHITMAN.

Subscribed and sworn to before me this 8th day of October, A. D. 1897.

WM. E. ZABRISKIE,
Notary Public (1),
N. Y. Co.

[SEAL.]

No. 452. XXX. 27. S.C.

Brief of Choate & Wilson for Pet.

Filed Oct. 16, 1897.

IN THE

# Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
OCT 16 1897
JAMES H. McKENNEY
CLERK

OCTOBER TERM, 1897.

GEORGE L. WHITMAN,
*Petitioner,*

*vs.*

NATIONAL BANK OF OXFORD,
*Respondent.*

## Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
*Of Counsel for Petitioner.*

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.—*Ex Parte* GEORGE L. WHITMAN, Petitioner.

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**Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of George L. Whitman, plaintiff in error, versus National Bank of Oxford, defendant in error.**

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of George L. Whitman, plaintiff in error, respectfully shows to this Honorable Court as follows:

FIRST. Your petitioner is a citizen of the United States, residing in the City and State of New York.

SECOND. On or about May 29, 1895, the National Bank of Oxford brought an action in the Circuit Court of the United States, for the Southern District of New York, against your petitioner upon the cause of action hereinafter stated; and in its complaint therein said National Bank of Oxford alleged that your petitioner was a stockholder of a certain corporation of the State of Kansas known as the Arkansas City Investment Company, and was, as such stockholder, liable to the plaintiff, said National Bank of Oxford, for the amount of a judgment alleged to have been theretofore recovered by said National Bank of Oxford against the said Kansas corporation in a court of the State of Kansas; and the relief demanded in said action against your petitioner was a judgment against him for the amount of the said judgment of the said Kansas Court against said Kansas corporation, with interest thereon and costs. Said complaint set forth said provisions of the Constitution and Statutes of the State of Kansas as fixing the liability of your petitioner to action

and recovery thereunder in said Circuit Court of the United States for the Southern District of New York.

THIRD. Your petitioner answered the said complaint and among other defenses thereto maintained in his said answer that said Circuit Court of the United States for the Southern District of New York had not jurisdiction of the subject of the action or of the subject of the cause of action alleged in said complaint, and that the said complaint did not state facts sufficient to constitute a cause of action.

FOURTH. Thereafter the issues raised by said complaint and answer were brought to trial before the Honorable HOYT H. WHEELER and a jury in said Circuit Court of the United States, on June 10, 1896; and thereupon, at the close of such trial, after the taking of oral and documentary evidence, both parties having rested, a verdict was directed in favor of said National Bank of Oxford against your petitioner, for the amount of said Kansas judgment against said Kansas corporation, and interest thereon and costs of said action in the Circuit Court of the United States, to which direction and action of the Court said petitioner duly excepted.

FIFTH. Thereafter your petitioner made a motion to set aside the said verdict, which motion was denied, your petitioner duly excepting to such denial, and judgment was thereupon entered in favor of said National Bank of Oxford against your petitioner for $4,205.48, with interest thereon at the rate of ten per cent. per annum.

SIXTH. Thereafter your petitioner made up his bill of exceptions to review such judgment and proceedings, and took out a writ of error to review the same; and such writ of error was thereafter brought before the United States Circuit Court of Appeals for the Second Circuit, and argument having been had thereon said Circuit Court of Appeals thereafter rendered a decision for the affirmance of the judgment of said United States Circuit Court, which decision is as follows:

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL BANK OF OXFORD

v.

GEORGE L. WHITMAN.

The Constitution of the State of Kansas provided, prior to the year 1866, and still provides, in Section 2 of Article XII., as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law, but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of Chapter 23 of the General Statutes of Kansas of 1868, Section 40 of the same chapter, as amended in 1883, and Section 44 of the same chapter, which are still the statutes of the State, provided as follows:

"SECTION 32. If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SECTION 40 (as amended): A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business."

"SECTION 44: If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City Bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

| | |
|---|---|
| George L. Whitman, New York City | 1,000 shares. |
| Samuel Newell, " " " | 649 " |
| James L. Huey, Arkansas City | 349 " |
| Mary L. Newell, New York City | 1 " |
| Mary E. Huey, " " " | 1 " |

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December, 1890, it made

a general assignment for the benefit of its creditors, and from that time completely suspended its business, and thereafter, at the expiration of one year, was deemed to be dissolved under the provisions of Section 40 for the purpose of enabling its creditors to sue its stockholders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff the National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time; but, in 1895, the plaintiff duly obtained judgment against the bank, in a State Court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the Circuit Court for the Southern District of New York against the defendant George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank. The complaint in the action alleged all the foregoing facts. The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The Court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, C. J.:

It will be observed, that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was

based, such as the guaranty, the discount and the nonpayment, were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established against the stockholders the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the Constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single stockholder who was a resident of such State, has already been stated.

It is to be premised, as was clearly shown by Justice CLIFFORD in Morley vs. Thayer, 3 Fed. Rep., 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect (Grover vs. Slaughter, 15 Pet., 449; Wells vs. Robb, 43 Kan., 201). It is also to be premised, as stated in Pollard vs. Baily, 20 Wall., 520, and reaffirmed in Fourth National Bank vs. Francklyn, 120 U. S., 747, that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, when the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest Court of Kansas, and because they show the particulars in this class of statutes, which the Supreme Court regards as especially significant upon the question of construction.

The case of Flash vs. Conn, 109 U. S., 371, was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The Court, after saying that great, if not conclusive, weight must be given to the construction which the

highest Court of New York had placed upon the statute, and that, following such construction, the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the Court said: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard vs. Bailey, 20 Ward, 520; Terry vs. Tubman, 92 U. S., 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the Court held, could only be done by a suit in equity.

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out an execution thereon which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State Courts; but, in Huntington vs. Attrill, 146 U. S., 657, the Supreme Court stated its position in regard to the duty of a Court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordanee with the obiter remarks of the Justice who delivered the opinion of the Court in Steam Engine Co. vs. Hubbard, 101 U. S., 188, 192. The Huntington case grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The Court said: "As the statute imposes a burdensome liability on the officers for their wrongful act it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the

creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground on principle for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest Court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholders' obligation, and whether it was several or joint, definite or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual lability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of Section 14, Chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts and responsibilities of the company." The Supreme Court of Kansas in Grund vs. Tucker, 5 Kan., 70, held that "under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The Court thus anticipated the decision in Flash vs. Conn, regarded "each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock," rejected the idea of a proportionate liability or *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In Hentig vs. James, 22 Kan., 326, the Kansas Court, in discussing the mode of procedure under Section 32, said that the creditor had two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of judgment against the corporation, but said noth-

ing either in favor of or against the exclusive jurisdiction of the Kansas Court over the second mode of procedure.

In Howell vs. Mangelsdorf, 33 Kan., 194, the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the Court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial Court to grant such motion came before the Supreme Court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further says that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory," citing Flash vs. Conn, *supra*. It is true that this language is *obiter* in the sense that it is not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution, or was not enforceable, and that, therefore, in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas Court in Abbey vs. Dry Goods Co., 44 Kan., 415, is important. The case was under Section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The Court held that the liability of the stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and

the decision of the Missouri Court of Appeals upon the same subject (Perry vs. Turner, 55 Missouri, 418) and the decisions in Bank of Poughkeepsie vs. Abbotson, 24 Wend., 473, and Paine vs. Stewart, 33 Conn., 516, upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the Howell case, in regard to the character of the stockholders' liability and of the creditors' remedy under Section 32, are manifest. The means which the statutes provided to enforce the individual constitutional liability determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (Flash vs. Conn., *supra.)* Section 32 has thus by the decision of the State Court, the *indicia* of a transitory action, and although these *indicia* might be overcome by a manifest intent of the legislature that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the Howell case, *supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided—one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and, if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under Section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceedings looks eventually towards a proportionate division among them. It

does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under Section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that in the Bank of North America vs. Rindge, 154 Mass., 203, which was a suit in Massachusetts to enforce the provisions of Section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but it is also true that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the Court was unable to decide whether the statute authorized an action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the Courts of that State. But we must take the case as the parties present it to us." But in the Hancock Bank vs. Ellis, 166 Mass., 414, the pleader was more careful, and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder the Court said: "A declaration which sets forth that according to the law of Kansas the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good;" and, further, that "jurisdiction exists here (in Massachusetts) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the Courts of Massachusetts have not yet stated their own opinion upon the statute in question. In Fowler vs. Lamson, 146 Illinois, 472, the plaintiff had recovered a judgment against a Kansas corporation before the Superior Court for Cook County, Illinois, an execution had been issued upon that judgment, which was returned unsatisfied, and the plaintiff then brought a bill in equity in the Courts of Cook County against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In Tuttle vs. National Bank of the Republic, 161 Illinois, 497, the question upon the Kansas statute came before

the Court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven Judges dissenting.

In Marshall vs. Sherman, 148 N. Y., 9, the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not included. The constitution and statutes of Kansas were fully set out in the complaint, but the Judge who spoke for the Court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the Court of Kansas, and that therefore the Court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the Court was of the opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State Courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the Court (Rindge case, *supra*), the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the Courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the stockholder to creditors (Guerney vs. Moore, 131 Missouri, 650), the argument is simply one against the expediency of the statute.

The decisions in the Federal Courts which affirm the jurisdiction of Federal Courts in other States to enforce this particular statute of Kansas are Bank of North America vs. Rindge, 57 Fed. Rep., 279; Rhodes vs. U. S. National Bank, 66 Fed. Rep., 512; McVickar vs. Jones, 70 Fed. Rep., 754. Decisions in addition to those already cited, in favor of jurisdiction of foreign Courts of foreign States to enforce similar or analogous State statutes, are Paine vs. Stewart, 33 Conn., 516; Cuykendall vs. Miles, 10 Fed. Rep., 342; Auer vs. Lombard, 72 Fed. Rep., 209.

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas Court did not acquire jurisdiction to render judg-

ment against the corporation, because the cashier made a voluntary appearance and waived the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney at law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder (Tenney vs. Townsend, 9 Blatchf., 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken with him by the president "when he left" in May or June, 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and Section 12 of Chapter 23 of the general statutes of 1869 provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such changes was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the Secretary of State was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the Circuit Court is affirmed with costs.

WILLIAM B. HORNBLOWER and HOWARD A. TAYLOR, for the plaintiff (defendant in error).

JOSEPH H. CHOATE and WM. G. WILSON, for the defendant (plaintiff in error).

[ENDORSED:] U. S. Circuit Court of Appeals, for the Second Circuit.—National Bank of Oxford vs. George L. Whitman. Opinion, SHIPMAN, C. J.—United States Circuit Court of Appeals, Second Circuit. Filed Jul. 21, 1897, William Parkin, Clerk.

SEVENTH. A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals.

EIGHTH. Your petitioner is advised and believes that the said decision and judgment of the said United States Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

NINTH. The issues presented the questions, among others, of the nature and extent of the individual liability of a stockholder in a Kansas corporation for the debts of the corporation, and the power of the legislature of Kansas to establish new forms of procedure for courts outside the territorial limits of that State.

It was maintained on behalf of the defendant that the liability was purely statutory—*Morley vs. Thayer*, 3 Fed., 739; *Wells vs. Robb*, 43 Kan., 201; that the statute contained no declaration whatever of general liability, and whatever liability it created was an inference from the remedy which it provided; and that, as was said in *Pollard vs. Bailey*, 20 Wall., 520, "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The present case was clearly one falling within this rule. The Kansas statute did not create a general liability without a remedy, so as to permit the enforcement of such liability by an appropriate common-law action; but, on the contrary, the provision for the liability is not only coupled with a provision for a special remedy, but exists solely by virtue of the provision for a special remedy.

The special remedy is twofold. After judgment has been recovered against the Kansas corporation, and execution thereon has been returned unsatisfied, then the Court may, on notice, make an order that execution on the same judgment be issued against any of the stockholders "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon;" "or the plaintiff in the execution may proceed

by action to charge the stockholders with the amount of his judgment."

The present action rests on this authoritty only. It is an action to charge George L. Whitman, as a stockholder of the Arkansas City Investment Company, with the amount of the judgment recovered by the National Bank of Oxford against the Arkansas City Investment Company.

It was maintained on behalf of defendant that such a remedy, being purely a creation of the Kansas statute, could only be reesortd to within the territorial limits of the State of Kansas; that it was unknown to the common law and unknown to the Circuit Court of the United States for the Southern District of New York, and that it was not competent for the legislature of Kansas to prescribe new remedies to be administered by Courts without the State of Kansas.

This is the doctrine substantially held by the highest courts of three of the States : *Bank of North America vs. Rindge*, 154 Mass., 203 ; *Marshall vs. Sherman*, 148 N. Y., 9 ; *Fowler vs. Samson*, 146 Ill., 472 ; *Tuttle vs. Nat. Bank of Republic*, 161 Ill., 497.

TENTH. While it is true, as a general rule, that the courts of the United States will follow the construction which the highest courts of the several States have put upon the statutes of their respective States, this general rule must be taken with two qualifications to which it is essential that full recognition should be given in the consideration of the questions here presented. These qualifications are :

1. Such construction must form part of an actual decision by the State Court of an issue presented for decision by the case before it.

2. The issue presented must be of such character that the State Court is authorized to pass final and authoritative judgment upon it.

No one will question these propositions in the abstract. If the question upon which the State Court assumes to pass judgment is not a question presented by the case before it, or is a question which it is not within the power of the State Court to determine, the action of the Court is equally *coram non judice*.

Applying this to the present case, we find :

1. The decision of the Circuit Court of Appeals is founded

upon the assumed decision of the Supreme Court of Kansas in the case of *Howell vs. Mangelsdorf*, 33 Kan., 194, wherein that Court used the following language: "This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State, where personal service can be made on the stockholder." But, in fact, this language was no part of the decision of the matter before the Supreme Court of Kansas, and was a mere *dictum*.

It is well settled in the rulings of this Court, as stated in *Carroll vs. Carroll*, 16 Howard, 286, by Mr. Justice CURTIS: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore, this Court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Virginia*, 6 Wheat., 399, this Court was much impressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be received, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte Christie*, 3 How., 292, and *Jenness et al. versus Peck*, 7 How., 612, are an illustration of the rule that any opinion

given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

In *Howell vs. Mangelsdorf*, the plaintiff had obtained a judgment in the Kansas Court against the Kansas corporation, and had then resorted to the first of the two alternative remedies provided by the Kansas statute—that is, to a motion for an order that an execution issue upon that judgment against an individual stockholder of the Kansas corporation. The notice of the motion was served upon the stockholder outside the territorial limits of the State of Kansas; and the sole question presented was, whether such service without the State conferred jurisdiction upon the Kansas Court to make the order for the issue of execution against the stockholder. The Court decided the question thus presented, by holding that service of notice without the State did not confer upon it jurisdiction to order the execution, and denied the motion on the ground of want of jurisdiction to grant it.

And that was all that the Kansas Court could decide, upon the question before it. If, by any possibility, the question whether the second of the two alternative remedies provided by the Kansas statute—that is, an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment—was maintainable without the State of Kansas, could have come before the Kansas Court, it certainly was not then before the Kansas Court, for no such action had been attempted. The sole question was whether service of notice of motion for execution without the State conferred jurisdiction upon the Kansas Court, and that Court held that it did not. Having decided itself to be without jurisdiction, the Kansas Court had no possible jurisdiction to go on and determine other questions which were not before it.

And yet it is upon the assumed decision of the Kansas Court, as to the jurisdiction of Courts of other States, in actions which might be brought therein to charge stockholders there with Kansas judgments against their corporations, that all the authority for the present determination of the CircuitCourt of Appeals rests. The cases of *Bank of North America vs. Rindge*, 57 Fed., 279; *Rhodes vs. United States National Bank*, 66 Fed., 512; *McVicker vs. Jones*, 70 Fed., 574, which are put forward as precedents for the decision in the present case, rest only on the assumed authority of *Howell vs. Mangelsdorf* as being the authoritative decision of the Kansas Court upon the precise question presented here.

II. If the question had been presented to the Kansas Court, it could not have been competent for that Court to have determined what jurisdiction the Courts outside of Kansas might entertain to enforce the remedy of an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment.

It is a fundamental proposition that each court is the judge of its own jurisdiction. Any other rule would lead to chaos.

If the Kansas Legislature may pass statutes, and the Kansas courts may decide, as general principles of law, binding upon parties not before them, that the Kansas statutes are to be enforced by courts without the State of Kansas, whether State courts or Federal courts, then the Legislature of Kansas can, in effect, legislate for the whole of the United States, and the Legislature of every other State can do the same. New remedies, new forms of action may be devised, and while the State courts may decline to exercise the jurisdiction, the courts of the United States are bound to do so; and the rights of each citizen will depend, not on well-settled principles and forms of procedure, but on the accident of citizenship in the same State, or diversity of citizenship, between the plaintiff and the defendant.

The present case is a forcible illustration. Your petitioner cannot be sued upon the cause of action here asserted, in any action brought in the courts of New York, because those courts do not recognize the power of the Legislature and courts of Kansas to impose upon him without that State the form of remedy sought to be enforced. But he is exposed to liability upon the same cause of action in the courts of the United States whenever the plaintiff is fortunate enough to be a citizen of another State than New York. If your petitioner were a citizen of the State of Pennsylvania, then he would be secure against any suit which the National Bank of Oxford might bring, but would be exposed to attack by a citizen of New York, who cannot attack him now.

The courts of Kansas have no authority to determine the powers and functions of the courts outside the limits of Kansas, and cannot by any decision of theirs, under the guise of construing a State statute, confer or impose jurisdiction without those limits, any more than the Legislature of Kansas could do the same thing by statutes containing an express declaration to the like effect.

If the Kansas statute had said upon its face, and in express terms, that any plaintiff in a Kansas judgment and execution

against a Kansas corporation might maintain an action in any court of any other State, or any court of the United States wherever situated, to charge a stockholder with the judgment in Kansas against the corporation, it can hardly be that such an enactment would be held binding outside the State of Kansas. The Circuit Court of the United States for the Southern District of New York might well say that it did not derive its jurisdiction from the Legislature of Kansas, but that its forms of remedy and procedure were derived from the Acts of Congress, among which is that instructing it to follow the common law practice and procedure of the State of New York. And yet here we have the same Circuit Court of the United States for the Southern District of New York entertaining a novel jurisdiction and enforcing a new form of action in obedience to a *dictum* of a Kansas Court which has assumed to declare that the Kansas Legislature intended as much in and by a statute which says nothing of the kind.

The form of action is one unknown to the common law. No such action is known to the common law as one to charge a stockholder individually with a judgment against his corporation. The remedy is novel; under the authority of *Pollard vs. Bailey (supra)*, the remedy is exclusive; and it is the remedy which has been resorted to and assumed to be enforced in the present case; an action to charge B with a judgment against A, recovered in a foreign jurisdiction in a suit to which B was a stranger.

ELEVENTH. Your petitioner is informed and believes that the questions here presented are of great importance and of wide reaching effect; that the decisions of the highest courts of several of the States and especially those of Massachusetts, New York and Illinois, are in direct conflict with that of the Circuit Court of Appeals for the Second Circuit, which your petitioner now asks to have reviewed; and that a very large number of actions, involving in the aggregate very large sums of money, and presenting the same questions here presented, are now pending in the courts of various States and in various courts of the United States; and that it is matter of great public interest and importance that such question should be heard and passed upon and determined by your Honorable Court, to the end that the law controlling the same and the constitutional principles involved should be finally settled and established.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled George L. Whitman, plaintiff in error, against The National Bank of Oxford, to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act af Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said act, and that the said determination of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

GEORGE L. WHITMAN.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss. :

GEORGE L. WHITMAN, being duly sworn, says that he is the petitioner named in the foregoing petition, which has been signed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE L. WHITMAN.

Subscribed and sworn to before me this 8th day of October, A. D. 1897.

WM. E. ZABRISKIE,
Notary Public (1),
N. Y. Co.

[SEAL.]

No. 182. 27

Office Supreme Court U. S.
FILED
JAN 17 1899
JAMES H. McKENNEY, Clerk.

Brief of Choate & Wilson for Pet'r

# Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 17, 1899.

No. 182.

GEORGE L. WHITMAN,
*Petitioner,*

*vs.*

THE NATIONAL BANK OF OXFORD.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

# BRIEF FOR PETITIONER.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
*Of Counsel.*

C. G. Burgoyne, Walker and Centre Streets, N. Y.

# SUPREME COURT OF THE UNITED STATES,

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN, Petitioner,

vs.

THE NATIONAL BANK OF OXFORD.

## BRIEF FOR PETITIONER.

This is a writ of *certiorari*, issued by this Court, October 26, 1897, to remove into this Court the record and proceedings in a certain cause in the Circuit Court of Appeals for the Second Circuit, wherein George L. Whitman was plaintiff in error, and The National Bank of Oxford was defendant in error.

The original action was brought in the Circuit Court of the United States for the Southern District of New York, by the National Bank of Oxford against George L. Whitman, and in that action the plaintiff recovered judgment against the defendant upon a trial before the Hon. HOYT H. WHEELER and a jury. The judgment was affirmed by the Circuit Court of Appeals, the decision having been handed down July 21, 1897.

### Statement.

This action was begun May 29, 1895 (3).

The cause of action was set forth in the complaint as follows (6–14) :

The plaintiff was and is a national banking association, incorporated and doing business in the State of Pennsylvania and a

citizen of that State. That defendant was and is a citizen of the State of New York and a resident of the Southern District of New York. That the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs.

That the defendant is a stockholder in the Arkansas City Investment Company, a corporation of the State of Kansas, holding fifty thousand dollars of its stock. The plaintiff is a creditor of the Arkansas City Investment Company upon the guarantee by that company of two promissory notes made by certain individuals, and maturing respectively on February 7th and March 4th, 1891. That after the creation of these obligations the Arkansas City Investment Company was duly dissolved, and completely suspended its business, and has ever since failed to resume; which dissolution and suspension occurred more than twelve months prior to the bringing of an action by plaintiff against said company in a District Court of the State of Kansas, upon said guarantee. That in said action on April 16, 1895, plaintiff recovered judgment for the amount of said obligations with interest and costs, amounting altogether to $3468.30.

That the constitution and statutes of the State of Kansas contain the following provisions:—

*Constitution*, Article XII, Section 2: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

*General Statutes*, 1868, Chapter 23, Section 32: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

*Same*, Section 40, as amended in 1883: "A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court

of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

*Same*, Section 44: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

That execution was issued upon said Kansas judgment out of the Kansas court, against the Arkansas City Investment Company, and returned wholly unsatisfied. That said company is wholly insolvent. And that defendant "has not met any part of his liability as a stockholder under the statutes hereinbefore mentioned."

The complaint demands judgment against the defendant for the amount of plaintiff's Kansas judgment against the Arkansas City Investment Company, together with ten per cent. interest upon the amount of the Kansas judgment, and costs.

Upon the trial the plaintiff proved the incorporation of a Kansas corporation named the Arkansas City Bank, by certificate dated September 2, 1886, and its organization on December 4, 1886, of which bank the defendant was one of the incorporators and was a stockholder to the extent of 1000 shares, representing $100,000 of the capital stock (16-19); and one James L. Huey was examined as

a witness on behalf of plaintiff by deposition taken in Kansas. Huey testified that he was the cashier of the corporation from the time of its organization until December, 1890, (20). An attempt was made to prove that the name of the corporation was in the meantime changed to the Arkansas City Investment Company. Huey testified that a record was kept of the proceedings of the corporation, but that he was unable to find such record (21) and that it was his recollection that such record or minutes were taken possession of by Mr. Newell, the president (24). Without further proof of loss or inability to produce such record, Huey was permitted, under objection and exception, to testify that a meeting of the stockholders and directors was held and that " we relinquished the name of the Arkansas City Bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on " (24). Also under objection and exception, an affidavit of Huey on file in the office of the Secretary of State, of Kansas, to the effect that " on the 25th day of May, A. D. 1889, the stockholders unanimously voted to adopt the name ' The Arkansas City Investment Company,' " was received in evidence (25).

Huey further identified two promissory notes ; one (29) made by Silas Kennedy, to the order of " J. L. Huey, cash.," for $2825.00, dated September 1, 1890, due March 4, 1891, payable at the office of the Arkansas City Investment Company ; the other (31) made by J. D. Harkleroad and E. C. Harkleroad, to the order of " J. L. Huey, cash.," for $2050.00, dated August 4, 1890, due February 7, 1891, payable at the office of the Arkansas City Investment Company.

Each of these notes bore the following endorsement :

" For value received I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand, and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon. Arkansas City Investment Co., Arkansas City, Kansas. J. L. Huey, Cash." (50-51.) Huey testified that he placed this endorsement upon each note.

On December 15, 1890, the Arkansas City Investment Company made a general assignment for the benefit of its creditors to Charles A. Scruton (26-27) and Huey testifies that the assets of the Company were then turned over to Scruton, who took charge of, and

collected them, and attended to the business of assignee until November, 1894, when Huey became assignee in place of Scruton.

Plaintiffs action in Kansas was begun by voluntary appearance given by Huey on its behalf (37) in the following terms (49):

"Comes now the said defendant, The Arkansas City Investment Company, and enters its appearance herein and waives the issuance of process and service of summons upon it, and submits to the jurisdiction of this court in this cause for all the purposes of this suit. The said defendant, however, reserves the right to answer or plead herein on or before the 14th day of January, A. D. 1895.

"THE ARKANSAS CITY INVESTMENT COMPANY,

"By J. L. HUEY, Cashier and Managing Officer."

The alleged judgment was entered in the District Court of Kansas, for Cowley County, April 16, 1895 (36), by default "the said plaintiff appearing by its attorneys, Troup & Brown, and the defendant appearing not." It purports to find "that the said defendant, The Arkansas City Investment Company is indebted to the plaintiff, The National Bank of Oxford, Pennsylvania, upon the promissory notes mentioned and set forth in the plaintiff's petition and sued on in this action in the sum of $3,449, with interest from this date, at the rate of ten per cent. per annum," which amount together with $19.30 costs it adjudges that plaintiff recover of defendant (37).

Execution on this judgment was issued to the Sheriff of Cowley County, and returned wholly unsatisfied (38).

J. L. Huey was discharged as assignee of the Arkansas City Investment Company, by an order of the same District Court, June 2, 1896, Troup & Brown appearing as his attorneys (32-33).

At the close of the trial the court directed a verdict in favor of the plaintiff for $3,468.30, being the amount of the Kansas judgment above stated, viz. $3,449 damages and $19.30 costs (40), and being the same amount for which judgment was demanded in the complaint (8).

The defendant entered a motion to set aside the verdict which was denied (12-13) and judgment entered (14).

On writ of error to the Circuit Court of Appeals the judgment was affirmed. The following is the specification of errors assigned:—

## Specification of Errors.

FIRST.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (40):

Q. You may now state what was done by the stockholders and officers of the Arkansas City Bank, with reference to the cessation of business as a bank, and the furtherance of other business?

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business, and wanted to have the use of the name of the Arkansas City Bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City Bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question, and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City Bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings. Motion denied. Defendant excepts.

SECOND.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (41):

Q. Was a copy of these proceedings made and furnished to the Secretary of State of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

THIRD.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (41):

Plaintiff's counsel offered in evidence a duly certified copy from the office of the Secretary of State of the State of Kansas of the proceedings of the stockholders of the Arkansas City Bank, for the changing of its name certified by the secretary of the company and attested by the Secretary of State of Kansas.

By Defendant's Counsel: "I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders; and, furthermore, that it is not in compliance with the requirements of the laws of Kansas."

Objection overruled. Defendant excepts.

Paper admitted in evidence and marked Plaintiff's Exhibit 3.

Fourth.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (47):

Q. What was done with the paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the District Court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, Pennsylvania.

Fifth.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (48):

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy. Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 5.

Sixth.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (50):

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 6.

SEVENTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (53) :

Plaintiff's counsel offered in evidence an order of the Kansas Court, discharging the assignee of the Arkansas City Investment Company.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked Plaintiff's Exhibit 7.

EIGHTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (59) :

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the District Court of Cowley County, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL : " I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action."

Objection overruled. Exception by defendant.

Judgment admitted in evidence and marked Plaintiff's Exhibit 8.

NINTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (61) :

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the Sheriff of Cowley County, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever and no evidence for the purpose of establishing any

liability on the part of the defendant in this action. Objection overruled. Exception by defendant.

Execution admitted in evidence.

TENTH.—That said Judge on said trial refused to direct a verdict for the defendant, and directed a verdict for the plaintiff as follows (64–65):

Plaintiff's counsel moves the Court to direct a verdict for the plaintiff. Defendant's counsel moves the Court to direct a verdict for the defendant upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, as the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas Court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas and elsewhere, is no judgment against the stockholder, and is *res inter alios*. That the remedy provided by the Kansas statutes has no extra-territorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against a Kansas corporation as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon a contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation, were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes, and with the full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protection and safeguards shall be afforded to the defendant in proceedings brought in other States than Kansas, nor competent for the State of Kansas or its Legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the

State of New York, the jurisdiction of this Court and that of the courts of New York State being concurrent, and the procedure being the same in both in actions at common law; and that this action could not be maintained in the courts of New York State. That the alleged jurisdiction of the Kansas Court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas Court. That this Court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The Court denied defendant's motion and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's motion for the direction of a verdict for defendant and to the ruling of the Court directing a verdict for the plaintiff.

ELEVENTH.—That the jury upon said trial under the direction of the said Judge rendered a verdict for the plaintiff, and such verdict was contrary to the evidence in the case.

TWELFTH.—That the jury upon said trial under the direction of the said Judge rendered a verdict for the plaintiff, and such verdict was contrary to law (65).

THIRTEENTH.—That the said Judge upon the conclusion of said trial refused to set aside the said verdict and directed judgment thereon as follows:

> Thereafter the Court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted (66).

## Argument.

The principal question presented here is that of the personal liability of the defendant as a stockholder in the Kansas corporation for the *judgment* claimed to have been recovered in the Kansas court against that corporation.

The action here was not brought on the ground of an original liability of defendant for an original obligation of the corporation. It is brought for the exact amount of the Kansas judgment, with interest from the date of the Kansas judgment, and at the rate of interest fixed by the Kansas judgment. This is the prayer, or demand of the complaint (8). And this is the verdict actually rendered under the direction of the court (40), viz. for the sum of $3,468.30 the amount of the judgment entered in the Kansas court on April 16, 1895, in favor of the plaintiff and against the Arkansas City Investment Company, with interest from that date at the rate of ten per cent.—fixed by that judgment (37)—amounting together to $3,868.05. And for the amount of this verdict, with further interest from date at the same rate of ten per cent, the judgment (14-15) was entered, which is now before this Court for review.

The argument involves the discussion of the origin, nature and extent of any individual liability on the part of defendant for the debts and obligations of the Kansas corporation, the power of the Kansas legislature to create new remedies to be administered elsewhere than in Kansas, and the power and duty of courts elsewhere to entertain jurisdiction for the enforcement of such remedies.

## POINT FIRST. Defendant's liability, if any, is purely statutory.

The liability is not imposed by the constitution of Kansas, because that is not self executing.

This precise point was determined by Justice CLIFFORD, in *Morley v. Thayer*, 3 Fed. 739. In that case the constitutional provision under discussion was embraced in the constitution of the state of Ohio, but was in the identical language cited above from the constitution of the state of Kansas. " Enough " said the court " appears in the constitutional provision itself to show that the view of the complainants that the article is self-enforcing cannot be sustained. It ordains that 'dues from corporations *shall be secured* by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and by such other means as shall be provided by law.' Cases undoubtedly arise where

the provision of a constitution operates immediately, as when the object is to suppress an existing evil ; but when the provision points to something more to be done, and looks to some future time for the accomplishment of what is required, the general rule is that it contemplates legislation to carry it into effect. Power is plainly given to the legislature in this case to pass laws to render stockholders individually liable for the debts of the corporation, and it doubtless makes it their duty to do so ; but it by no means follows that the stockholder is made liable where there is no statute creating such liability or prescribing the means or mode of its enforcement. Beyond doubt it looks to legislation, nor does it contain a word to justify the conclusion that the framers of the provision supposed that they were completing the end in view, as no attempt is made to provide any other means for its accomplishment than legislation (*Groves v. Slaughter*, 15 Pet., 449, 500). Even if the rule would be otherwise, in case the legislature had failed to comply with the constitutional mandate, still it is clear that the statutes passed in fulfillment of that requirement constitute the unmistakable rule of decision and furnish the only basis of judicial action."

The same question was considered in *Barnes v. Wheaton*, 80 Hun, 8, by Judge MARTIN, then of the New York Supreme Court, now of the Court of Appeals. He says : "The provisions of the constitution of the state of Ohio set out in the complaint declare that, 'dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law ; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon to a further sum at least equal in amount to such stock." In *State of Ohio, etc., v. Sherman* (22 Ohio St., 411), it was held that the legislature of that state "had no power under the present constitution to create corporations without securing the individual liability of their stockholders, at least to the minimum amount required by the constitution ; and if the act of incorporation did not secure these either by expressed provision or by requiring from the corporators or stockholders such acts of organization or otherwise as would subject them to the constitutional provision, the act would be unconstitutional and void. In *French v. Teschemaker* (24 Cal., 518, 539), where a similar provision in the constitution of that State was under consideration, it was held that the provision was not self-executing, but required legislation to carry it into operation. The

cases of *Morley v. Thayer*, (3 Fed. Rep., 737), *Fusz v. Spaunhorst* (67 Mo., 256) and *Groves v. Slaughter* (15 Pet., 449) are to the same effect. It is obvious that this provision of the constitution of the State of Ohio is not self-executing, but that its purpose is to confer upon the legislature the power, and impose upon it the duty of securing dues from corporations by imposing upon the stockholders of such corporations as are organized under the laws of that State, an individual liability ", etc.

So likewise in *Marshall v. Sherman*, 148 N. Y., 9, it is said in regard to this very Kansas constitution: " We think it quite clear that the provision of the constitution referred to is not self executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. It was intended simply to confer authority upon the legislature of that State to legislate upon the subject, and perhaps it imposed upon that body the duty of securing the debts of corporations by imposing upon the stockholders an individual liability, and by such other means as in its discretion it should deem proper, always limiting such power and discretion by the provision that each stockholder should be made liable to an amount equal to the stock held by him. The legislature did enact such statutes, and it is these enactments, and not the constitution itself, which is sought to be enforced in this action."

*Tuttle v. National Bank of the Republic*, 161 Ill., 497, is to the same effect, and refers to this same Kansas constitution.

Upon this point the decision of the Circuit Court of Appeals in the present case is in harmony with the decisions which have been cited. It says,—

" It is to be premised, as was clearly shown by Justice CLIFFORD, in *Morley v. Thayer* (3 Fed. Rep. 739) with respect to this particular constitutional provision, that it is not self executing in its character, and that statutory legislation was therefore required to carry it into effect."

Obviously, then, whatever liability exists, exists solely by virtue of the statute. It is the creature of the statute. It is what the statute declares it to be; no more, no less. It has efficacy where the statute has force and effect *proprio vigore*. It differs in origin and in nature from an ordinary common law or contractual liability.

In *Wells v. Robb*, 43 Kan. 201, the Supreme Court of Kansas quoted with approval the language of the same court in *Henting v. James*, 22 Kan. 326, in reference to this very subject: " The lia-

bility arises solely by constitutional or statutory provision. As a consequence, the matter here *is wholly governed by the statute*, and the rights of the party claiming under the statute *must be ascertained by it*." This was said of the liability under section 32 of the Kansas statute.

Any argument, then, which our adversaries seek to draw from the language of the Kansas constitution, is unavailing. The liability of the stockholder here must be established solely upon the terms of the *statute*.

**POINT SECOND. The Kansas statute does not create or impose a general liability, or a liability as upon contract.**

It is noteworthy that the statute does not declare any personal liability of stockholders. It does not say, "Each stockholder shall be severally individually liable for the debts of the corporation to an amount equal to the amount of the stock owned and held by him." *That* was substantially what the New York statute said, and what every statute has said which has been heretofore construed as creating a general liability which follows the person into all jurisdictions. *That* was substantially what was said in the statute before the court in *Flash v. Conn*, 109 U. S. 371, the case mainly relied upon as supporting the conclusion of defendant's general liability, here. There the language was: "All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company."

*And that* was substantially what was said in the Kansas statute for the incorporation of insurance companies, known as section 14, chapter 31, of Kansas laws of 1863: "The stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." This was the language of the statute which was before the Kansas court in *Grund v. Tucker*, 5 Kan. 70, which decision, as is said in the opinion of the Circuit Court of Appeals (53) "anticipated the decision in *Flash v. Conn*."

But the Kansas statute which is under consideration in the present case will be searched in vain for any declaration of this kind. It nowhere contains any expression to the effect that stockholders shall be individually liable. What it does say is: "If any execution shall have been issued against the property or effects of a corporation * * * and there cannot be found any property whereon to levy such execution, *then execution may be issued* against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned * * * or the plaintiff in the execution *may proceed by action* to charge the stockholders with the amount of his judgment."

Thus the liability of a stockholder under this Kansas statute is only created by creating two special remedies against him; (1) an execution issued against him upon a judgment against his corporation, or, in the alternative, (2) an action against him by the "plaintiff in the execution" to "charge" him with the amount of such judgment.

Under this section 32 there is no liability for the corporation's contracts and liabilities generally, but only a liability to be compelled by execution or action to pay the amount of judgments which may be recovered against the corporation. It is not the original debt which the stockholders may be compelled to pay, but only the judgment. The statute of limitations runs in favor of the stockholder, not from the maturity of the original debt, but from the return of an unsatisfied execution against the corporation. This was distinctly held in *Bank of North America v. Rindge*, 57 Fed. 279.

These distinctions which we have pointed out go to the very root of the matter. The general liability declared by the statutes of New York and other states, above referred to, is a liability for the original debt of the corporation, and the original debt must be established against the stockholder. As was said in *Kincaid v. Dwinnelle*, 59 N. Y. 551, "The judgment against the corporation is of no virtue or effect in the action against the stockholder, and is *only* evidence as proving the performance of the condition precedent." But it is held in *Bail v. Reese*, 58 Kan. 614, that in a proceeding under the Kansas statute to enforce individual liability, the judgment against the corporation is *conclusive* upon stockholders, in the absence of collusion or fraud. "As the judgment was valid, the court committed error in allowing the defendants to go behind it and contest matters which were conclusively settled by the judgment against the corporation."

The difference is radical. In the one case we have a liability for the original debt; in the other a liability for a Kansas judgment against the corporation. The debt is the basis of the action to enforce the one; the Kansas judgment is the foundation, and the *only* foundation of the proceeding to enforce the other.

Moreover, the point already noted should be continually borne in mind, that while the New York statute, and other kindred statutes which have been held to create a general personal liability, contain an express declaration of such liability, this Kansas statute contains nothing of the sort.

In *Pollard v. Bailey*, 20 Wall. 520, it is said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement." "The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, *that remedy, and that alone, must be employed.*"

To like effect is *Terry v. Little*, 101 U. S. 216: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The *first* thing to be determined in all such cases is, therefore, *what liability has been created.* There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless *special attention* is given to the *precise language of the statute* under consideration."

Now the Kansas statute does not assume to create a general liability without a remedy, or a general liability with a remedy; it does not assume, in terms, to create any liability at all. It merely assumes to create a remedy, and the liability is nothing more than an inference from the remedy so created.

It necessarily results that no other liability exists than such as is clearly implied in the remedy created, and clearly enforceable by that remedy.

**POINT THIRD. The remedy is not available without the State of Kansas.**

It is hardly necessary to say that the remedy is one unknown to the common law. It is purely the creation of the Kansas statute. Thus we have presented the question of the power of the Kansas legislature, to create remedies, as distinct from liabilities, to be enforced beyond the boundaries of the state of Kansas.

The remedy is a proceeding to enforce the judgment which has been rendered against the Kansas corporation in the Kansas court. It designs to enforce this judgment by proceeding against the stockholder to collect it from him. It provides two alternatives.

The first is, an execution may be issued directly against the stockholder, upon the judgment against the corporation. Clearly this is confined to the territorial limits of Kansas.

The second is, an action by "the plaintiff in the execution" to charge the stockholder with the amount of the judgment against the corporation.

Now it is but fair to the Kansas legislature to say that nothing in the statute itself indicates any intention on its part that either form of the remedy was to be employed outside that state. Certainly such intention should not be imputed to it without strong evidence that it existed. Let us consider its precise terms and scope. It says:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly; *or* the plaintiff in the execution *may proceed by action* to charge the stockholders with the amount of his judgment."

Here are two proceedings provided. One summary, one deliberate. The use of the summary proceeding is in the discretion of the court which has rendered the judgment against the corporation.

The use of the deliberate proceeding is vested as a right in "the plaintiff in the execution." The statute necessarily contemplated the use of the former in Kansas, only. It could never have assumed to legislate for the issuance of foreign executions out of foreign courts, or for the issuance of executions in foreign jurisdictions, against stockholders, and upon judgments against their corporations. Nor could it have assumed to confer upon foreign courts the discretion to entertain motions for the issue of such executions. Had the Kansas legislature attempted to do any such things its action would have been nugatory.

But the Kansas legislature clearly attempted nothing of the sort. No such intention being expressed, none can be presumed. If there were any question as to intent, it would be answered in favor of an intent to keep within its legitimate powers, *ut res magis valeat.* But no such question is possible here. The provisions are naturally and properly addressed to proceedings to be taken and remedies to be administered in the state of Kansas, in like manner as all other provisions of Kansas statutes relative to the legal proceedings and remedies.

This is unmistakeably and indisputably manifest in regard to the summary proceeding. So much, at least, *must* be conceded.

Such being the only construction which can properly be given to the provisions regarding the first proceeding, which comprise the whole of the section in question, with the exception of the last three lines, we may well ask what evidence those three lines afford of any intent to assume an entirely different attitude in regard to the second proceeding. Nothing in the language of those three lines demands any such construction. On the contrary, the ordinary rule for the construction of statutory provisions *in pari materia* and the natural meaning of the language used, in its connection with that which precedes, unite to indicate that the intent was the same in regard to both proceedings, so far as related to the jurisdiction within which they were to be taken.

The language of these lines is: "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The words "plaintiff in the execution" refer back to the execution mentioned in the earlier part of the same section, and indicate the two alternatives in the mind of the legislature; a motion in aid of the execution, and an action in aid of the execution.

It surely will not be held, without the faintest indication of such purpose, that the Kansas legislature assumed to confer upon the plaintiff in a Kansas execution the right to maintain an action in aid of that execution, in foreign jurisdictions. The Kansas legislature will be acquitted of undertaking to transcend its powers, or of assuming to exercise powers of extremely doubtful validity, when there is nothing in the language of the statute or in the circumstances under which it was passed to indicate any such intention, and when its reasonable and natural interpretation avoids wholly such accusation.

To this we might reasonably add that if the Kansas legislature designed to accomplish the result which our adversaries claim has been brought about by the enactment of these few lines, it never would have resorted to so clumsy and dubious an expedient to that end. Individual liability of stockholders for corporate debts was no new thing. It existed in many states. It was referred to in the Kansas constitution. It already existed in Kansas under the statute considered in *Grund v. Tucker*, 5 Kan. 70, which provided that the "stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." Adjudications of many courts had declared by what sort of legislation a general personal liability, which would follow the person of the stockholder into any jurisdiction, might be created. The state constitution suggested the way in which it might be done; the New York statute, and the national banking law, and its own insurance corporation law, afforded precedents ready to hand. The way was open and clear. Nothing was easier and simpler than to declare such general personal liability, if that was the purpose of the legislature.

But it is evident that the Kansas legislature had no such thought. Perhaps it did not so much as consider the likelihood of there being non-resident stockholders of Kansas corporations, to be made amenable elsewhere. What it did was to establish certain remedies, unknown to the common law, to be enforced by the courts within its jurisdiction. We repeat, there is not one particle of evidence of any intention to go beyond this.

If, on the other hand, notwithstanding these considerations, the provisions in question are to be construed as having force beyond the boundaries of Kansas, then we have presented the case of the

Kansas legislature imposing remedies of its own creation upon the courts of other states.

By what authority can the Kansas legislature prescribe a new remedy to be administered in the courts of the state of New York, or in the courts of the United States within the state of New York?

The state of New York, by its own statutes, has prescribed the remedies to be employed in its courts. Among these remedies we do not find an action to charge a stockholder with a judgment, either domestic or foreign, against his corporation. Nor was such an action known to the common law.

The remedies available in the Circuit Court of the United States for the Southern District of New York were formerly those known to the common law in the State of New York in the year 1792, and such further remedies as congress had from time to time created by express enactments. By section 914 of the Revised Statutes of the United States it is provided: "The practice, pleadings and forms and modes of proceeding in civil causes other than equity or admiralty causes in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of procedure existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." We find no authority in these sources for an action by the plaintiff in an execution against a corporation to charge a stockholder with the amount of his judgment against a corporation.

Suppose the Kansas legislature had said in so many words: "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, *and such actions may be maintained in the courts of Kansas and in the courts of any other State and in the courts of the United States.*" Will it be claimed that such an enactment would have conferred jurisdiction to entertain such actions upon any of the courts named, except the courts in Kansas? Is it not clear that such an attempt to transcend its powers would have been wholly nugatory?

It will be observed that the question is not one giving full faith and credit to the Kansas judgment. That question would be presented if the action here were brought against the corporation, upon the Kansas judgment. It does not arise in an action here against the stockholder.

In this action, brought here against the stockholder, the question presented is whether the Kansas legislature can confer upon a Kansas judgment against the corporation, a new and unusual force and efficacy outside the state of Kansas, making it in legal effect *everywhere* a judgment against the stockholder, and authorizing an action to be brought upon it *anywhere* to charge the stockholder with it.

In *Marshall v. Sherman*, 148 N. Y. 9, an action brought under this very Kansas statute, the court says: "The question is thus presented whether a right of action unknown to the common law, and existing only by force of the statutes of another state can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. * * * We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a *special and peculiar remedy* against the stockholders of a corporation created under the laws of that state."

In *Story on Conflict of Laws*, § 572, it is said: "Wherever a remedy is sought, it is to be administered according to the *lex loci;* and such a judgment is to be given as the laws of the state where the suit is brought authorize and allow, and not such a judgment as the laws of other states authorize or require."

Similarly, in 2 *Kent's Commentaries*, 462: "Remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted, and the *lex loci* has no application."

And, again, in *Wharton on Conflict of Laws*, § 721: "When a party seeks to avail himself at home of the law of a foreign state, as determining the legal relations of a case arising in that state, he must do so through the process of the *lex fori;* and if no process of such forum is available for such purpose, then his remedy fails." And at § 749: "Nor will a court, in order to give effect to a foreign law, introduce into its own system a foreign remedy alien to its procedure. If none of the established machinery of the court whose aid is sought is capable of applying such foreign law, then the plaintiff is without remedy."

It is quite possible that some confusion of ideas has existed regarding the effect upon a stockholder of a judgment against his corporation.

In one sense, a valid judgment against a corporation is binding

and conclusive upon the stockholder. It is binding and conclusive upon him, *as* stockholder, that is, as regards his rights and interest in the corporation represented by his holdings of stock. To that extent he is a part of the corporation and the corporate acts are his acts. It would be as illogical as it would be impracticable to permit the stockholder in the interest of his stock to renew controversies which had been already determined in suits by and against the corporation itself as his lawful representative. Such determinations must be final in regard to the interests represented by his stock.

But it is quite otherwise in regard to the individual liability of the stockholder. That rests on an entirely different ground. That is enforceable, not against the money which by investing, in the stock, he has committed to the corporate enterprise, but against his other property generally. And while such liability comes to him because he is a stockholder, it is imposed upon him in his individual and personal capacity.

And thus it is that while, as regards his stock, and the share in the corporation which his stock represents, the judgment against the corporation is binding and conclusive upon him, the same is by no means true as regards his individual personal liability. As to *that* the corporation does not represent him. *That* liability is not a corporate asset. So far as *that* liability is concerned he is a distinct person from the corporation. A judgment against the corporation is, as to him, *res inter alios*. He is neither party nor privy to it; and, it is not even evidence against him, except in jurisdictions where it may be given the force of such evidence by express statute.

This being so, it is apparent that while the Kansas statute may make the Kansas judgment against the corporation evidence, and conclusive evidence, againt the stockholder, in respect of his individual liability, in the Kansas courts, it cannot have that effect in the courts, whether state or federal, within the state of New York. The laws of Kansas cannot make new rules of evidence for those courts.

It has been expressly and repeatedly held in New York that a judgment against the corporation is not even evidence against the stockholder.

Thus in *Moss v. McCullough*, 5 Hill, 131, Judge BRONSON said: "I think the judgment is neither conclusive nor *prima facie* evidence against the stockholder of the original debt or demand against the company."

And in *Miller v. White*, 50 N. Y. 137, cited with approval in *Chase v. Curtis*, 113 U. S. 452, it was said by Judge PECKHAM: "If a stockholder be a surety, the judgment against the principal does not bind him. * * * If he be a principal debtor with the company, each severally liable, then a judgment against one party severally liable has no force against another who is also severally liable."

How, then, can the liability of the stockholder, created and declared only by this *remedy* for enforcing against the stockholder the Kansas *judgment against the corporation*—and *not* the original debt—be enforced in state or federal courts within the state of New York?

## POINT FOURTH. The decisions relied upon to support the judgment rest upon insufficient authority.

The whole fabric of supposed authority has been built up upon a mere *dictum* of the Kansas Supreme Court in *Howell v. Manglesdorf*, 33 Kan. 194.

In that case it was sought to enforce the *first* of the two remedies provided in section 32, an execution against the stockholder upon a judgment against the corporation. The *second* of the two remedies was neither resorted to, nor in any way involved. The notice of the motion for an order that the execution issue, required to be given by the terms of section 32, was served upon the stockholder without the state of Kansas, and the stockholder objected to the jurisdiction of the court on that ground.

The objection was sustained. The court held that it could not acquire jurisdiction by service of the notice outside the state of Kansas, and therefore had not acquired jurisdiction over the stockholder in the case before it.

Being thus without jurisdiction, the Kansas court could decide nothing further. It could decide no question against the stockholder who had not been brought before it; and *a fortiori* it could decide no question against other stockholders of other corporations who might at some future time be prosecuted on the ground of individual liability. Having decided itself to be without jurisdiction, it was clearly incompetent for it to decide any other question whatever.

But, disregarding this plain and absolute limitation, the court, perhaps wishing to console the "plaintiff in the execution" for his disappointment in the denial of the motion, perhaps to assert the all-prevailing force of the Kansas statutes, went on to express its views on a question which was in no wise presented by the case before it, and which it could not have authoritatively passed upon if it had been so presented; viz., the jurisdiction of the courts of other states to entertain actions under this section 32 of the Kansas statute. It says:

"This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

It is conceivable that a case might arise in which it would be necessary for the Kansas court to decide whether a New York court *had had* jurisdiction of matters claimed to have been judicially before the New York court. It is inconceivable that a case could arise in which the Kansas court could decide authoritatively in advance whether a New York court *would have* jurisdiction to entertain an action under a foreign statute, or to enforce a liability created by a foreign statute, or to enforce a remedy created by a foreign statute.

But even if the question might have come before the Kansas court, it is clear that it *did not*, and the language of the court is nothing more than a *dictum*.

It is well settled that such a *dictum* is not to be regarded as an authority.

In *Carroll v. Carroll*, 16 How., 286, it was said by Mr. Justice CURTIS: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of the common law an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore,

this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Va.*, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *Ex parte Christy*, 3 How., 292, and *Jenness et al. vs. Peck*, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

This language of the Kansas court, then, is not, as has been sometimes erroneously said, a *decision* of that court, interpreting the laws of Kansas, and therefore binding and controlling upon the question when it shall be raised in other courts. It is merely an expression of opinion which is entitled to consideration solely for its intrinsic weight and force, and not at all because it happens to have been uttered by a Kansas court.

Weighed in this balance it will be found wanting. It does not reason. It simply asserts that the action "may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder." And the only authority for this assertion is the citation of *Flash v. Conn*, 109 U. S., 371, *Dennick v. R. R. Co.*, 103 U. S., 11, *McDonough v. Phelps*, 15 How. Pr., 372, and *Seymour v. Sturges*, 26 N. Y., 134.

The assertion, then, is entitled to just so much weight as these authorities give it and no more. They give it no weight whatever.

*Flash v. Conn* was an action under the New York statute which expressly declared that the stockholders were severally individually liable, and prescribed no particular remedy. This throws no light

upon the construction of the Kansas statute which declares no liability, but simply provides the novel remedy of an action against the stockholder to charge him with a Kansas judgment against the corporation.

*Denning v. Railroad Co.* was an action to recover damages for a personal injury. It held only that actions of that particular class were transitory. "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial."

*McDonough v. Phelps* was an action brought in New York by creditors of a Connecticut corporation to recover of stockholders the amount of their unpaid *subscriptions* and was decided in favor of defendants.

*Seymour v. Sturges* was an action brought in New York by a creditor of a Maryland corporation to recover from a stockholder his unpaid *subscription*, and the stockholder was held not to be liable.

Thus it is seen that not one of the decisions supports the *dictum* in *Howell v. Manglesdorf*, which is left a naked assertion, unsupported by either reason or authority.

And yet, upon the supposed authority of this language in *Howell v. Manglesdorf*, and upon this alone, rest all the decisions which are relied upon to support the present judgment. A brief examination of those decisions will confirm this.

*Bank of North America v. Rindge*, 57 Fed. 279. This was an action at law brought in California by a creditor of a Kansas corporation to enforce the liability of a stockholder under section 32 of the Kansas statute. The case came up on demurrer to the complaint, and presented but two questions: first, whether the plaintiff's remedy was at law or in equity, and, second, when the statute of limitations began to run. The court quoted the language of the Kansas court in *Howell v. Manglesdorf* and then said: "The construction of the Kansas statute by the highest court of that state is *binding on this court*. That is the general rule in respect to the construction of state statutes and constitutions * * * The Kansas statute upon which the suit is based, *as construed by the Supreme Court of that State*, provides two remedies for enforcing the individual liability of stockholders, one of which is by an ordinary action at law, to be instituted wherever personal jurisdiction of them can be acquired."

*Rhodes v. United States National Bank*, 66 Fed. 512. This action was brought in Illinois by a creditor of a Kansas corporation against a stockholder to enforce his liability under section 32 of the Kansas statute for a Kansas judgment against the corporation. The court quotes the language of *Howell v. Manglesdorf*, and says: "As this is a question of the proper construction to be given to a constitutional and statutory provisions of a state, the *decisions* of the highest court of that state are *binding upon this court.* * * * A case similar to the one at bar arose and was heard on demurrer by the United States Circuit Court for the Northern District of California in 1893, under the same provisions of the Kansas statute and constitution, and the same ruling was made, the court *following the decisions* of the Supreme Court of Kansas. *Bank of North America v. Rindge*, 57 Fed. 279."

*McVickar v. Jones*, 70 Fed. 754, was an action at law, brought in New Hampshire, against a stockholder of a Kansas corporation, upon a Kansas judgment against the corporation. The case came up on demurrer to the declaration. The court sustained the cause of action as one which the court was *bound* to recognize and enforce, on the strength of the "*decisions*" of the courts of Kansas and of the United States, citing *Howell v. Manglesdorf*, *Bank of North America v. Rindge*, and *Rhodes v. United States National Bank*.

*Mechanics' Savings Bank v. Fidelity Ins. Trust & S. D. Co.* 87 Fed. 113, was a motion for a new trial, and, as was said in the opinion by DALLAS, J., the principal question was, under section 32 of the Kansas statute, "Does an action at law by a single judgment creditor lie against a single stockholder by virtue of these provisions?" After referring to the character of the liability considered in *Flash v. Conn* and similar cases, the court goes on to say: "Unfortunately the meaning of the provisions with which this court is now required to deal is not so clearly obvious. The Kansas constitution does not define the liability which it imposes, nor direct how that liability shall be enforced. It seems to have been contemplated that this omission would be met by legislation, and, accordingly, there was enacted the statutory provision which is copied at the head of this opinion. * * * The remedy provided is twofold and alternative. * * * The proceeding by action, it has been held, may be brought by a single creditor and is transitory. This appears to have been *settled* by the *decisions* of the Supreme Court of Kansas. It is objected that upon these points these decisions

were *obiter dicta*, and not authoritative ; but they appear to have received full consideration by the Kansas court, and its opinion is at least entitled to great weight, *Bank v. Whitman*. 76 Fed. 697 [present case]. If, however, I entertained a doubt as to the propriety of following that court, I would feel *constrained* to do so, because its views have been acquiesced in and adopted by several of the federal courts." To this are cited our old friends, *Howell v. Manglesdorf*, *Bank v. Rindge*, *Rhodes v. Bank*, *Mc Vickar v. Jones*, *and* the present case ; a chain of authorities, each link of which hangs only upon those before it, and the first link, *Howell v. Manglesdorf*, hangs upon nothing.

Thus we find that *Bank of North America v. Rindge* was decided as it was because the court considered itself *bound* by the "*decision*" in *Howell v. Manglesdorf*. Manifestly an opinion of this kind adds nothing to the authority of the first decision. And it is the same with all the rest.

*Rhodes v. U. S. Nat. Bank* was decided upon the authority of *Howell v. Manglesdorf* and *Bank of North America vs. Rindge*, the court, as before, stating that it was "*bound*" by the "*decision*" in the first case. No added authority here.

*Mc Vickar v. Jones* is based upon *Howell v. Manglesdorf*; *Bank of North America v. Rindge* and *Rhodes v. U. S. Nat. Bank* the Court again expressing itself as "*bound*" by the first case. No added authority therefore.

*Mechanics' Savings Bank v. Fidelity Ins. Co.* rests upon *Howell v. Manglesdorf*, *Bank of North America v. Rindge*, *Rhodes v. U. S. Nat. Bank* and *Mc Vickar v. Jones*, the court again considering itself "*bound*" by the first "*decision*", and is therefore no added authority.

In neither of these cases do the courts give any reasons to support their conclusions, but each one of them is based solely upon the proposition, "The Supreme Court of Kansas has so decided and we *cannot* question that decision."

As it now appears that the Supreme Court of Kansas has never so decided, all this apparent weight of authority must fall with the case from which it is derived.

The stream cannot rise higher than its source.

*Ex nihilo nihil fit.*

The decision in *Hancock Bank v. Ellis*, 166 Mass. 414, does not help the defendant in error here. It was rendered on demurrer to

a declaration which set forth the pleader's construction of Kansas law, as matter of fact. As a demurrer admits the facts averred in the pleading demurred to, it necessarily admitted that the Kansas law was as stated in the declaration. The decision means no more than if the declaration truly stated the law of Kansas, an action might be maintained in Massachusetts. And as the declaration averred that law to be that a stockholder of a Kansas corporation is liable to a judgment creditor of the corporation as upon contract, suable anywhere, the court did not experience much difficulty in overruling the demurrer. The decision makes no attempt to determine what the Kansas law really is. As is said of it in *Hancock Nat Bank v. Ellis, infra*, "The court said that the declaration stated a case; thus achieving, in the apt words of the defendant's counsel in this case "a temporary triumph of mendacious pleading."

The other cases cited, as *Auer v. Lambard*, 72 Fed. 209, and *Huntington v. Attrill*, 146 U. S. 657, throw no light upon the question presented here by the peculiar character and special remedies of the Kansas statute. They arose under statutes expressly declaring a liability, as in *Flash v. Conn*, and have no bearing on the question whether the special statutory remedy created by section 32 of the Kansas statute is in force beyond the limits of Kansas.

**POINT FIFTH. The authorities against the support of this judgment have the greater weight, because they are founded in reason and upon established principles.**

The fundamental principles and the radical distinction which has already been noted, are fully discussed and clearly brought out in the leading case of *Lowry v. Inman*, 46 N. Y. 119.

"In many charters," says the court, "the intent is obvious to impose an absolute liability on the stockholders. In all such cases the liability is personal, and following the person may be enforced as other personal obligations are enforced, and according to the course of procedure in the place where the individual sought to be charged is found. It is not in such case a statutory *remedy*, or a liability based upon a statute, and which is *confined* in its operation to the limits of the sovereignty creating the corporation, and without extra-territorial force or obligation. It is like other obligations,

assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation and effect are to be determined by the *lex loci;* but the *remedy* is governed by the *lex fori.* If, therefore, the act of the legislature of Georgia, incorporating the Northwestern Bank of Georgia, had declared, in terms, that each stockholder should be individually liable for the redemption of the bills and payment of the debts of the bank, or that the stockholders generally, or jointly and severally, or otherwise, should be so liable, there would be no doubt, upon principle, or the decisions of our own courts, that the courts of this state would be open to a creditor of the bank, to enforce the liability of a stockholder for the payment of such debt, according to the terms of the charter." But if the intent was to charge the property of the stockholder by a peculiar and unusual procedure, " prescribing the remedy going with it and as a part of the right, a general personal liability will not attach to the stockholder. * * * The right of creditors of the corporation, against the corporators, rests upon the statute, and the assent of the stockholders to its terms and conditions, and the same statute gives the remedy, and within well settled rules the party is confined to the remedy given. Whether the obligation is imposed, and the remedy given solely by the statute, or rests upon the assent of the stockholders to the terms and conditions of the act, the result is the same; the obligation, or liability, and the remedy, are *inseparable;* and the party interested is confined to the remedy prescribed by the act, and assented to by the stockholder." "The remedy is necessarily confined to the sovereignty of Georgia, and can have no recognition or effect beyond the boundary of that state. The charter creates no right and imposes no obligation disconnected with the prescribed remedy, which is local in its character, and not capable of being enforced without the state of Georgia. A foreign tribunal cannot enforce it."

The same rule was declared by this court in *Pollard v. Bailey,* 20 Wall. 520, where it is said: " The individual liability of stockholders in a corporation is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement." " The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A *general liability* created by statute *without a remedy* may be enforced by an appropriate common law action. But

where the provision for the liability is coupled with a provision for a *special remedy*, that remedy, and that alone, *must be employed*."

*Huntington v. Attrill*, 146 U. S. 657, in no wise departs from this rule. On the contrary, it, in effect, confirms it. For it holds that the statute of New York, declaring that in case of a false report by the officers of a corporation "all of the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," created a general liability, equally with the provisions declaring the individual liability of stockholders in certain cases; and that the judgment which had been recovered against the officer in New York upon that liability could be enforced by bill in equity to reach defendant's property in another state; and that such bill was not open to the defence that the original judgment was for a penalty "in the international sense."

This same Kansas statute was before the New York Court of Appeals in *Marshall v. Sherman*, 148 N. Y. 9. That was an action in form like the present one, the complaint reciting the constitution of Kansas and the same sections of the Kansas statutes, recovery by the plaintiff of a judgment in the courts of Kansas against a Kansas corporation in which the defendant was a stockholder, and the return of an unsatisfied execution thereon. Judgment was demanded against the stockholder for the amount due on the Kansas judgment against the corporation.

In its opinion the court says: "We think it quite clear that the provision of the constitution referred to is not self executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. * * * The legislature did enact such statutes, and it is these enactments and not the constitution itself which is sought to to be enforced in this action. The question is thus presented whether a right of action unknown to the common law and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. * * * We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a *special and peculiar remedy* against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were *intended to operate* and be enforced only within that

jurisdiction. It is quite clear that as to some of their provisions, at least, it would be impossible to enforce them in this state, and they should be construed as enactments *in pari materia*, and as a whole. * * * The relations of the defendant as a stockholder of the corporation are fixed and governed by the laws of the state in which the corporation is domiciled and under which it was created. If those laws created a liability against the defendant upon certain conditions and under certain circumstances, they also provided a *special and peculiar remedy*." It was unanimously held that the action could not be maintained in the courts of New York.

*Bank of North America v. Rindge*, 154 Mass. 203, presented the same question. The declaration alleged that the plaintiff had recovered judgment in Kansas, against a Kansas corporation; that execution had been issued thereon and returned unsatisfied; that defendant was a stockholder in the corporation; and that the action was brought to charge him personally with the judgment, by virtue of the provisions of the laws of Kansas. The defendant demurred and the demurrer was sustained. The court says: "The question can hardly be considered as an open one in this commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of these states." This is put upon the ground that "complete justice can only be done in the courts of the jurisdiction where the corporation was created," and the court says: "We remain satisfied with the conclusions heretofore reached by this court that such an action, under the circumstances which appear here, ought not to be entertained in this state."

In *Fowler vs. Lamson*, 146 Ill. 472, after concluding that the Supreme Court of Kansas "has fully recognized and in effect held that stockholders of corporations organized under the constitution and foregoing statutes of that state are individually liable to creditors of such corporation to an additional amount equal to the stock owned by each of them," the opinion goes on, after quoting the terms of the Kansas statute, as providing "two *special* modes * * * by which creditors * * * may enforce the liability of stockholders," to say: "It is well settled that these *special remedies* having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, they alone can be pursued to enforce that liability. The reason of this rule is manifest. The liability only exists by force of some constitutional or statutory provision, and the person incurring that liability is presumed

to do so subject to its enforcement by the special provision made for that purpose, and no other. The amended bill in this case proceeds upon the allegation that the corporation has been dissolved, but attempts to enforce the individual liability of the defendants by a proceeding entirely different from that prescribed by the statute of Kansas, and thus deprives the defendants of the speedy and adequate remedy given them by that statute against other stockholders, if they should be liable. There is also the further insuperable objection to this proceeding; that it is an attempt to enforce the individual liability of the defendants in a jurisdiction other than that in which the corporation exists, the rule being that when a special remedy is given creditors of a corporation against its stockholders, the liability cannot be enforced in another state. The reason for this rule is forcibly illustrated by the above-quoted statute of Kansas, providing a remedy in case of the dissolution of a corporation, which remedy, it must be conceded, could only be enforced in the state of Kansas, where presumably the stockholders of the corporation generally reside. For the reasons here given, it is clear that the bill could not be maintained in this state. Judgments have not been maintained in this state or elsewhere against appellees. The proceeding is an attempt to enforce their individual liability as stockholders by compelling *them* to pay judgments against *the corporation*.

*Tuttle v. Nat. Bank of Republic*, 161 Ill. 497, is still stronger. It holds that the constitutional provision is not self executing, and that no declaratory statute had been enacted. "The legislature of that state, by such legislation as has been enacted, has only attempted to declare the remedy." "In determining the construction of these provisions of the statute of the state of Kansas, and considering the remedies provided, and bearing in mind that there is *neither a constitutional nor statutory liability effectively declared in that state*, we must construe these statutes *with reference to the remedy*, in the light of such rules and upon such principles as the courts of this state apply to the construction of such enactments. The remedy provided by the second clause of the first section quoted, and by the second section [§ 32] of the above quoted legislation, is a remedy unknown to the common law, and it is a remedy existing only by force of the statute of the state of Kansas. * * * A remedy special to a particular foreign state is not, by any principle of comity, enforcible here, and must be applied within the jurisdiction of the domicil of the corporation."

*Hancock Nat. Bank v. Farnum*, 40 Atlantic 341, was decided by the Supreme Court of Rhode Island in April, 1898. It holds that the constitution of Kansas creates no liability and that the provisions of the Kansas statute were not enforceable in Rhode Island. Discussing the proposition that the Kansas statute creates a contractual liability, the court points out that the question was not involved in *Howell v. Manglesdorf*, and that the utterance in that case was a mere *dictum*, and then goes on to say : " Certainly the ordinary elements of a contract are wanting. The minds of the stockholder and corporation creditor have not met upon the subject matter of the original debt. No credit has been given to the stockholder directly. He has not directly received the consideration, nor has he made a promise, express or implied. There is nothing between them which at common law would be regarded as a contract. But the statute imposes a liability upon grounds of equity and public policy. * * * In *Rice v. Hosiery Co.*, 56 N. H. 114, the court says : 'The liability which the plaintiff seeks to enforce is a mere creature of the statute, having none of the elements of a contract, whether express or implied. It is a naked statutory liability, entirely unknown to the common law, for the indebtedness of the corporation however it may accrue,—whether by the breach of a contract, or the commission of a tort. The stockholder is not liable upon the contract in one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either.' As this view is so clearly founded in reason, and as this court has already decided in *Sales v. Bates*, *supra*, [5 Atlantic 497,] that the liability is not a contract, we do not feel called upon to change that decision, even though the majority of courts may hold the other way. It follows, therefore, that the declaration does not state a contract under the laws of Kansas, as construed by the decisions of the Supreme Court of that state to which we have been referred, nor by our own construction of it."

Thus the weight of considered authority is wholly opposed to the series of decisions which are mere successive echoes of the *dictum* in *Howell v. Manglesdorf*.

It is demonstrated that the liability is not general, is not contractual; but is simply a liability to a special and peculiar remedy not generally available outside the state of Kansas. As was said in *May v. Black*, 45 N. W. Rep., 949, " It is a principle of law which does not appear to be questioned that where a special remedy

against stockholders is prescribed by the statute under which the corporation is formed, it must be enforced in the courts of that state exclusively."

It is also pointed out that the stockholder, sued in another state upon the Kansas judgment, is deprived of his remedies by way of enforcing contribution ; and it is manifestly unjust, and contrary to the spirit of the Kansas statute, that a single stockholder should be compelled to bear the whole burden.

**POINT SIXTH. If the liability of a stockholder in the Kansas corporation is upon contract, then the statutes of frauds forbid the enforcement of such contracts.**

If the obligation of a stockholder in a Kansas corporation, under this Kansas statute, is a contract on his part to be bound by the obligations or debts of such corporation, whether in form of simple debts or of judgment against the corporation, then the provisions of of the statutes of frauds apply.

In law, excepting so far as concerns the interests of the stockholder as represented by his stock, the stockholder and the corporation are two distinct entities, two distinct persons; and either may contract with the other, and may sue the other or be sued by the other.

If, then, the stockholder contracts to pay the debt of the corporation or the judgment against the corporation, it is simply the case of A contracting to pay the debt of B, or the judgment which may be recovered against B.

The statute of frauds requires any such *contract* to be in writing, signed by the party to be charged thereby. We have nothing of the sort here.

The Kansas statute of frauds,—Gen. Stat. Chap. 112, Sec. 6,—declares that no action shall be brought upon such agreement. The New York statute declares that every special promise to answer for the debt, default or miscarriage of another "shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith." Rev. Stat. Part 2, Chap. 7, Title 2, Sec. 2 and 3.

In *Moses v. Lawrence Co. Bank*, 149 U. S. 303, it was held that the statute of frauds of the state furnishes the rule of decision of the federal courts within the state. Therefore such a contract must be held void in the Circuit Court of the United States for the Southern District of New York.

It little matters, however, which statute controls. Whether the contract is declared void, or whether an action upon it is prohibited, is of little moment. The result is substantially the same.

How is the defendant here, A, to be—in the language of the Kansas statute—*charged with the judgment* against B, without writing signed by A, to that effect?

Manifestly he is to be so charged, if at all, *not* because he has so contracted, *but because the liability is imposed upon him by the Kansas statute.* In so far as that statute, *proprio vigore*, imposes the liability upon him, he is liable; in so far as it does not impose such liability, he is NOT liable.

And if the Kansas statute, instead of imposing and declaring a liability, simply provides a remedy, he is liable to that remedy only where the inherent force of the Kansas statute can make that remedy available.

## POINT SEVENTH. The action cannot be maintained under section 44 of the Kansas statute.

It has been already shown that the action was in fact brought under section 32; that the complaint demanded judgment against the defendant as a stockholder, for the amount of the Kansas judgment and the rate of interest which the Kansas judgment carried; that the verdict was for that precise amount and interest at that rate, and that the judgment which is now and here under review, followed the verdict, and was sustained by the Circuit Court of Appeals as a judgment founded on that section.

Clearly then, whatever other judgment *might* have been rendered, the judgment actually rendered is a judgment under section 32.

Under §481 of the New York Code, "The complaint *must* contain: * * * 3. A demand of the judgment to which the plaintiff supposes himself entitled."

The judgment demanded here is a judgment under Kansas sec-

tion 32. This characterizes the action as being brought under the provisions of that section. The complaint only assumes to state one cause of action. Obviously, the plaintiff could not seek to recover in one action on the two distinct grounds of sections 32 and 44; on the judgment against the corporation for the amount of that judgment and interest, and on the original debt for the amount of that debt and interest. If the complaint were ambiguous, the demand of judgment would declare that plaintiff elected to sue under section 32.

"Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them, being once made, the right to follow the other is forever gone." —*Rodermund v. Clark*, 46 N. Y. 354.

The proceedings against stockholders under these two sections are separate and distinct in character.

This is clearly put by the Supreme Court of Kansas in *Cottrell vs. Manlove*, 49 Pacific, 519: "Two remedies against stockholders of a corporation are afforded by the statute to its creditors. They are contained in Sections 32 and 44 of the chapter on Corporations." After quoting these sections in full, the court goes on to say: "The remedies afforded by these two sections cannot be called 'cumulative,' and considered equally open to creditors. One relates to the exigency of corporate insolvency; the other to that of corporate dissolution. Under one the proceeding lies because the corporation is bankrupt, though not necessarily dissolved; under the other, because it is dissolved, though not necessarily bankrupt. * * * The liability of the stockholders being one created by statute, the period of limitation upon the right to enforce it was three years. If it were true that the remedy of judgment against the corporation, and execution thereafter against the stockholders is cumulative, and likewise open to the creditor, the possession of such *additional* remedy could not extend the period of limitation. * * * An *election* between *mere forms of statutory procedure* does not give a right to extend the statutory period of limitation for the commencement of such procedure."

Again; the remedy afforded by section 44 is only available in Kansas.

The remedy of section 44 is that "suit may be brought against any person or persons who were stockholders at the time of such

dissolution, without joining the corporation to such suit; *and* if judgment be rendered and execution satisfied, the defendant or defendants *may sue all who were stockholders at the time of dissolution* for the recovery of the portion of such debt for which they were liable and *the execution* upon the judgment *shall direct* the collection to be made from property of each stockholder respectively," etc.

It will be observed that this remedy is only available upon the dissolution of the corporation, which dissolution for the purposes of such an action may be sufficiently shown by showing that the corporation has suspended business for more than one year. As we have already seen, this is a distinct proceeding from that contemplated in section 32, which may be brought at any time, and which must begin with an action and judgment against the corporation alone, as the foundation of any relief against the stockholder.

As the remedy of section 44 is designed as a remedy to be employed after dissolution, so likewise that remedy is coupled with an express provision for equalizing the burden of the corporate debt amongst all solvent stockholders. The defendant, from whom a creditor of the corporation in such case may have collected his debt, may sue all who were stockholders at the time of dissolution for their proper proportion of the amount which he has been compelled to pay, and if any of his fellow stockholders are not able to pay their shares, then the amount of the deficiency is to be divided equally among the remaining stockholders, " and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved".

If, then, the liability of the stockholder under this section is contractual in its character, we must take the whole contract together. The contract is not that the stockholder will independently pay any debts against the corporation after dissolution; but that he will pay with a right to enforce contribution amongst his solvent fellow stockholders. If, under this section, he is held to the terms of a contract so far as those terms are to his disadvantage, he is entitled to be so held only on condition that he shall receive the benefit of so much of the terms of the contract as are designed for his benefit and protection.

Thus it is clear that the proceeding provided by section 44 is an entirety, and also that it is a special proceeding provided for the

case of dissolution only, and that it is not available without the limits of the state of Kansas.

Accordingly it has been held of this and similar remedies, that the courts of other states would not entertain them, because it would be inequitable to endeavor to enforce them elsewhere than in the jurisdiction where the corporation is domiciled, and where alone full and complete justice could be done amongst all parties. And it is so held in reference to this very statute in *Marshall v. Sherman*, *Bank of North America v. Kindge* and *Fowler v. Lamson*, already cited.

And thus it was held by the Circuit Court for the District of Massachusetts, in *State National Bank v. Sayward*, 86 Fed. 45, that "a bill in equity cannot be maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another state," citing *Pool v. Railroad Co.* 144 Mass. 341, "If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the state under which the corporation is created, the courts of that state alone can afford complete and effectual judicial relief."

**POINT EIGHTH. There are serious objections to the assumption by courts of the United States of jurisdiction to enforce this remedy.**

Waiving, for the moment, the question of power, it is purposed to point out some of the reasons why, if the power exists, it should not be exercised.

Consider, first, the nature of the liability.

The stockholder is subjected to an action to compel him to pay a judgment against his corporation. In that action the judgment is conclusive, unless he can impeach it for fraud or want of jurisdiction. This is distinctly held in *Ball v. Reese*, 58 Kan. 614, and is recognized by Judge COXE in *Am. Freehold L. M. Co. v. Woodworth*, 82 Fed. 269.

Thus the stockholder is made liable, not for the *debts* of the corporation, but for the *judgments* which may be recovered against it. No matter what defences the corporation might have raised, and prevailed in, unless it failed to do so in fraudulent collusion with

the plaintiff he is conclusively bound. The failure to defend may have been due only to inattention or incompetency on the part of the managing officers, or to want of money to secure a proper defence. There may be some show of reason why a stockholder residing in Kansas should be thus bound. It may be said that he should look after the affairs of the company and watch to see that they were properly administered. But it is a very harsh rule, even as to him, for a stockholder cannot ordinarily meddle in the affairs of his company, or keep himself informed as to what is going on. And it is manifestly impossible that a stockholder residing in New York could keep himself so informed in regard to the business transacted in Kansas.

This being the rule, it follows, as has already been shown, that the right of action does not accrue against the stockholder until judgment has been recovered against the corporation; and it is only when the right of action accrues against the stockholder that the statute of limitations begins to run in his favor. Consequently, if the statute of limitations might have been evoked in favor of the corporation, but was not, the stockholder is helpless; and in this way his liability may be indefinitely prolonged.

In this present case Huey, assuming to appear for the company in the Kansas action, put in a defence, and then defaulted upon the trial. What might have come of that defence, or what other defences might have been successfully maintained will now never be known. The judgment stands conclusive unless we can *prove* Huey's collusion.

It is worthy of mention, also, that while the statute of limitations of Kansas runs in three years to protect the stockholder there from an action on this judgment, the statute of limitations of New York, where Whitman was sued, does not run until six years. So that, if the New York statute prevails, as held by Judge LACOMBE in *Schiffer v. Trustees of Columbia College*, 87 Fed. 166, the New York stockholder is liable for three years after the Kansas stockholder has ceased to be liable. If the New York stockholder is compelled to pay the judgment by an action brought after the Kansas stockholder has acquired the protection of the statute, his chances of subsequently enforcing contribution from the Kansas stockholder are evidently very remote.

In the next place, it is certainly in the highest degree undesirable that the federal courts should be in direct conflict with the highest courts of the states where such federal courts sit.

We have seen that the highest courts of Massachusetts, Rhode Island, New York, and Illinois have held that the remedy under this Kansas statute is not available in those states. The highest court of Missouri has held that the remedy was available there, not as matter of right, but *by comity only*, which is explained by the fact that Missouri has identically the same statute, the Kansas statute having been copied from that of Missouri.

Now, what does comity require of the courts of the United States? Do they owe it to the *dictum* of the Kansas court as to the force and effect of a Kansas statute in other states? Or do they owe it to the highest courts of the states where they severally sit and with whose practice their own is designed to conform?

It is for the highest courts of the respective states to say how far the provisions of the Kansas statute shall have effect in the courts of each state. The decision of such a question necessarily belongs to them; it cannot appertain to the courts of Kansas.

It may well be that on some broad question of general law, the federal courts might have and maintain a general and consistent policy which would necessarily be more or less at variance with the varying policies of the several states.

But no such consideration is apparent here. The state of Kansas has passed a statute for its own citizens. In other states each decides according to its own traditions and policy whether the provisions of the Kansas statute shall be given effect within it, that is, whether it is in harmony with the policy of the state that the foreign statute should be accorded effect within it.

What concern of national policy or of general law is involved in the question whether this Kansas statute shall be given effect in New York or Massachusetts or Rhode Island or Illinois? The federal courts do not exist for the enforcement of state statutes beyond the limits where such statutes have force *proprio vigore*. Was it ever contemplated in our scheme of government that Kansas should pass statutes to be enforced by the federal courts in the state of New York, after the courts of New York had held they were not enforcible there? Congress alone possesses the power to pass such statutes. It has not as yet been delegated to Kansas or to any other state.

Thirdly, the practical consequences of such assumption of jurisdiction, in opposition to the action of the state courts in refusing and denying it, will be not only confusion, but a denial of equal justice to all.

A stockholder of this Kansas corporation, sued in the state court in New York, Massachusetts, Rhode Island or Illinois, comes off victorious; but sued in the federal court he is defeated. His rights and obligations, which ought to be fixed and established on known principles, are thus made to depend upon the court in which the action happens to be brought. Naturally, under such circumstances, the plaintiff will always seek the federal court; but whether he can enter his suit there depends again upon the accident of diversity of citizenship between himself and the defendant. If he is a citizen of New York he cannot expect to recover against a stockholder who is also a citizen of New York, because he must bring his action in the state court where he is sure to be beaten. But if he can find a stockholder in Massachusetts he can go there, and sue him, and recover, because in Massachusetts he can sue in the federal court and recover.

If however, the judgment creditor of the Kansas corporation is fortunate enough to be a citizen of Massachusetts, and to find a stockholder who is a citizen of New York, then, although neither New York courts nor Massachusetts courts would entertain his action, he is nevertheless sure of his game, because diversity of citizenship offers him the choice between state and federal courts, and he has only to choose the latter, to succeed, while he would as surely fail in the former.

Let us suppose two judgment creditors of the Kansas corporation, one being a citizen of New York and the other a citizen of Massachusetts. Let us also suppose two stockholders of the Kansas corporation, both citizens of New York. Now, let us work out the results.

The New York creditor sues one of the New York stockholders in a New York court and is defeated. The Massachusetts creditor sues the other New York stockholder in the federal court, and prevails. Both stockholders have been exposed to the same peril. One has been mulcted and the other has gone free. One judgment creditor has got his money; the other has not.

Manifestly there is no contribution of gains among the judgment creditors. It certainly is not apparent how any contribution of losses could be worked out between these stockholders; for the New York stockholder who had been compelled to pay would have to follow his fellow stockholder into the state court, which had already declared the fellow stockholder not liable.

But if the fellow stockholder who had gone free in New York

should be inconsiderate enough to trust himself for a day in Massachusetts, and should be caught there by the Massachusetts creditor, still another complication would reveal itself. Would the New York stockholder be liable in Massachusetts because he was in the federal court there, which maintained liability under the Kansas statute, or would he have a good defence under the plea of *res adjudicata*, because the New York court which did not maintain such liability had already given judgment upon the same question in his favor?

To such absurd and grotesque results we are brought, in following to its legitimate and necessary conclusions the doctrine that the federal courts are to give extra-territorial force to this Kansas statute, regardless of the position taken by the courts of the respective states in which the federal courts sit; results which must operate to fatally discredit the administration of justice, and to bring the courts of the United States into contempt, and expose them to the distrust, if not to the hatred, of the people.

**POINT NINTH. The judgment should be reversed with costs.**

JOSEPH H. CHOATE,
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Of Counsel.

No. 182. 27

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FEB 24 1899
JAMES H. McKENNEY,
Clerk.

Reply Brief of Choate & Wilson for

# Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Feb. 24, 1899.

No. 182.

GEORGE L. WHITMAN,

*Petitioner,*

*vs.*

THE NATIONAL BANK OF OXFORD.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

## MEMORANDUM IN REPLY ON BEHALF OF PETITIONER.

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# Supreme Court of the United States,

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS—FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN,
Petitioner,
VERSUS
THE NATIONAL BANK OF OXFORD.

No. 182.

## Memorandum for Petitioner in Reply.

Respondent's argument rests upon the Kansas Constitution. It confesses the necessity for a declaration of general individual liability to sustain an action outside of the State of Kansas, and, finding it nowhere in the statutes, is driven to claim that the Constitution is self-executing, and therefore is in effect a statute. This Court is asked to reverse its well-established position in order to give effect to the argument, and to overrule *Groves vs. Slaughter*, 15 Pet., 449, which has been followed by Federal and State Courts for more than half a century. The point made by the Massachusetts Court in *Hancock National Bank vs. Ellis*, 51 N. E. Rep., 207, that the question of the extra-territorial effect of the Kansas statute could not properly come before the Kansas Court for authoritative decision, is in accord with petitioner's argument and should lead logically to the conclusion that the language in *Howell vs. Manglesdorf* cannot speak with authority, *not*, that it should be authoritative for that very reason.

There is nothing in the language of the Kansas Constitution which necessarily indicates an intention that the individual liability contemplated was to be one enforceable everywhere. Any form of liability extending to an amount equal to the stock held would satisfy the constitutional requirement.

The Kansas Legislature in carrying out the mandate of the Kansas Constitution have interpreted it as being satisfied by special remedies available in that State.

Nothing in the statutes themselves indicates any contemplation of stockholders' liabilities without the State.

The theory of the respondent that upon the petitioner's construction of the Kansas statutes there would not be a compliance with the Kansas Constitution is not well founded. Subjecting the stockholder and his property within the limits of Kansas to execution, and action in aid of the execution is a sufficient compliance with the Constitution. No stranger or citizen of another State reading the Kansas statutes would imagine himself liable out of Kansas, and as to the corporations, to which the Kansas statute applies, it may well have been the policy of the State to tempt foreign capital into the State by this restricted form of liability.

The marked contrast between the language of an earlier statute which was before the Kansas Court in *Grund vs. Tucker*, 5 Kan., 70, and the language here in question, shows a deliberate intention of the Kansas Legislature to treat the two cases differently; yet respondent argues that the two enactments should be deemed identical in meaning and result.

The language of the statute considered in *Grund vs. Tucker* was: "*The stockholders* of any company organized under this act *shall*, to the amount of stock by them held, *be jointly and severally liable* for all *debts or responsibilities* of the company."

The language of the statute here in question is: "If any execution shall have been issued against the property or effects of a corporation, * * * and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned. * * * *Or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.*"

The language of the Kansas Constitution is: "Dues from corporations shall be secured by individual liability of the stockholders," &c. "Dues" are the original debts of the corporation, not *judgments subsequently recovered* after such debts have become "due." Such judgments may or may not be founded on such debts, and certainly include more—as, for instance, costs, which become part of judgments. Moreover, many judgments recovered by de-

fault or carelessly suffered to be entered on insufficient grounds or without the addition of valid defenses are in no sense identical with debts.

It would be unreasonable to interpret the Constitution as intended to provide for anything beyond what are strictly the debts or "dues" of the corporation.

Not one of the decisions attributing extra-territorial force to this Kansas statute rests upon reason. The cases rest upon the assumed authority of *Howell vs. Manglesdorf*, or the erroneous interpretation of that case, as an actual decision, is their principal foundation.

If the question now arose for the first time, and the case of *Howell vs. Manglesdorf* had never been, it is not credible that the Court would find any sufficient authority for supporting this action.

The National Banking law is cited as a conspicuous example of a declaration of general individual liability. There is no similitude between the provisions of the National Banking law (U. S. Rev. Stats., Secs. 5151, 5152) and the Kansas statute. The language of the banking law is such as unequivocally to denote individual and personal liability. Section 5151 uses the words, "held individually responsible," and Section 5152, which excepts executors, trustees, &c., used the language "shall not be personally subject to any liability as stockholder, but the estate, &c., shall be liable." This amounts to a clear declaration of liability such as we contend is necessary to produce the result claimed by the respondent.

In the case of *Dennick vs. Railroad Co.* the real question was whether, under the terms of the New Jersey statute, the administrator referred to might be an administrator residing in another State; and, as an administrator under the laws of New Jersey could live anywhere and was not restricted to residence within the State, it would seem pretty clear that there was nothing in the statute making an exception in the case of the administrator who brought the action.

The point in regard to the Statute of Frauds is misapprehended. The Kansas Constitution does not declare that the stockholder of a Kansas corporation *contracts* to pay judgments recovered against

the corporation. It simply provides that judgments from corporations *shall be secured* by individual liability of the stockholders.

The Kansas statute does not declare that the stockholder contracts to pay debts of the corporation or judgments against the corporation. It simply provides that certain proceedings may be taken against the stockholder.

The complaint herein does not declare that the stockholder has made any *contract*. It simply avers the language of the Kansas Constitution and the language of the Kansas statute. Therefore, there was nothing in the complaint asserting a contract, and, therefore, nothing to call forth any plea of the Statute of Frauds.

The respondent *argues* that, by reason of the *dictum* in *Howell vs. Manglesdorf*, petitioner is to be deemed to be liable *upon contract or as upon contract*.

The petitioner argues that this cannot be so, because the Kansas statute declares no contract, while the Kansas Statute of Frauds prohibits an action upon a contract to pay the debt of another, unless such contract be in writing and signed by the party to be charged—and the Kansas Statute of Frauds is not to be presumed to be displaced and nullified by the statute now in question, upon a mere inference, and in the absence of clear evidence of an intention to so displace and nullify it.

This is not a question of pleading. It is merely meeting an argument as to an inferred intent of the special statute, by a counter-argument negativing the inference of that intent.

WILLIAM G. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

IN THE

# Supreme Court of the United States.

*Ex parte*

GEORGE L. WHITMAN,
Petitioner.

BRIEF FOR NATIONAL BANK OF OXFORD IN OPPOSITION TO APPLICATION OF THE PETITIONER FOR WRIT OF CERTIORARI.

The National Bank of Oxford, being the plaintiff in the suit in the Circuit Court, the defendant in error in the Circuit Court of Appeals, and the successful party in the Circuit Court of Appeals, respectfully presents, through its counsel, the following reasons why the prayer of the petition should be denied:

## POINT I.

### The amount involved is small.

The amount of the judgment in this case is $4,205.48. The sum involved has not been commensurate with the pertinacity of the petitioner in his defense of this litigation. It is so small as to require very especial

reasons for the intervention of this Honorable Court in the litigation and for the consequent continuance of the suit during some further period of time.

## POINT II.

**There has been no conflict of decisions among the Circuit Courts or the Circuit Courts of Appeals upon the questions of law brought up by this controversy.**

The decision in the present case follows the decision of the Circuit Court of Appeals for the Seventh Circuit, construing the same constitutional and legislative provisions of Kansas.

*Rhodes vs. U. S. National Bank*, 66 Fed. Rep., 512.

It also follows the decision of the Circuit Court in the First Circuit, upon the same point.

*McVickar vs. Jones*, 70 Fed. Rep., 754.

It also follows the decision of the Circuit Court in the Ninth Circuit upon the same point.

*Bank of North America vs. Rindge*, 57 Fed. Rep., 279.

It is also in accord with the decisions of other Federal Courts upon analogous constitutional and legislative provisions of other States than Kansas.

*Cuykendall vs. Miles*, 10 Fed. Rep., 342.

*Auer vs. Lombard*, 72 Fed. Rep., 209, decided by the Circuit Court of Appeals for the First Circuit.

It is also in accordance with all of the decisions of the Supreme Court in regard to the double liability of a stockholder in a national bank.

There is no authority whatever in any Federal Court to the contrary.

## POINT III.

### The decisions of the State Courts are not to the contrary.

The decision in this case is exactly the same as the decision in *Guerney vs. Moore*, 131 Mo., 650, decided by the Supreme Court of the State of Missouri. To precisely the same effect is the recent case of *Ferguson vs. Sherman*, 47 Pac. Rep., 1023, decided by the Supreme Court of the State of California.

As pointed out by Judge SHIPMAN, the highest Courts of the States of Massachusetts and New York have not yet come to a final conclusion. In the cases of *Marshall vs. Sherman*, 148 N. Y., 9, and *Bank of North America vs. Rindge*, 154 Mass., 203, the State Courts expressly held at the outset of their opinions that they were not permitted upon the pleadings to consider the construction placed by the Kansas Courts upon the Kansas Constitution and legislative statutes. The State Court of Massachusetts, in the later decision of *Hancock Bank vs. Ellis*, 166 Mass., 414, distinctly shows its readiness to follow the views of the Federal Courts, provided the pleader sets forth not only the Kansas Constitution and Statutes, but the construction placed upon them by the Kansas Courts. That all Federal Courts take judicial notice of the constitution, statutes and decisions of the courts of all of the States has been held from the beginning of the Supreme Court.

The only State Court which has definitely refused to consider this an extra-territorial liability, is that of Illinois *(Tuttle vs. National Bank of the Republic)*

In this case, the first opinion of the Supreme Court was in accordance with all of the other authorities. It will be found in the National Corporation Reporter of Chicago, 20th of December, 1894 (Vol. 9, p. 316). But this opinion was in some way rescinded, and the Court eventually held, by a vote of four to three, that the liability could only be enforced in the State of Kansas (161 Ill., 497).

The great trend of authority therefore in the State courts is the same as the unbroken line of decisions in the Federal courts. Were it otherwise, inasmuch as the State court of Illinois has not only deliberately overturned its own prior opinion, but has gone directly contrary to the case of *Rhodes vs. U. S. National Bank* decided by the United States Circuit Court of Appeals for that circuit in which the State of Illinois lies, it is unlikely that the views of that State court upon this point will be affected by a decision of the Supreme Court of the United States. These cases are brought in the Federal court simply by reason of diversity of citizenship and not because any Federal question is involved. No writ of error lies to review any of the decisions of the State courts where the cases have been brought originally in the State courts. No State court would be bound to follow the rulings of the United States Supreme Court upon this question.

## POINT IV.

### Upon the Principles Controlling.

Judge SHIPMAN'S opinion is sufficient to dispense with further discussion in support of the correctness of the decision of the United States Circuit Court of Appeals. We shall submit herewith, in case the Court

desires to read any part of the same, copies of our brief in the United States Circuit Court of Appeals. It may be pertinent to call to the attention of the Court one or two suggestions therein contained.

*(a)* It is to be noted that the Kansas constitutional provision and legislative provisions, taken together, make the statute practically identical with the Federal statute relative to the liability of stockholders of national banks.

The Constitution of Kansas says broadly :

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such *other* means as shall be provided by law."

No "*other* means" have been provided by law. But, for the enforcement of the double liability of stockholders thus declared in the Constitution itself, there have been special remedies provided by the Legislature, the statute, however, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of these special remedies.

If the Court reads the Constitutional provision in connection with the last clause of Section 32 of the legislative provision, the nature of this liability will be apparent.

The Constitution says :

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

The Legislature says:

> "The plaintiff in the execution" [*i. e.*, the judgment creditor of the corporation] "may proceed by action to charge the stockholders with the amount of his judgment" ["to an extent equal in amount to the amount of stock by him or her owned"].

Whether or not this Court deems the Constitutional provision to be self-executing, whether or not it was necessary for the Legislature to enact a statute in order to enforce the right declared in the Constitution—at any rate it was not necessary for the Legislature in such a statute to reiterate the declaration of the right. Our learned opponents, having contended to their satisfaction that the clause in the Constitution was not self-executing, have always proceeded to treat the subject as if the Constitution had never existed. Finding no express declaration of this Constitutional right in the Statute, they have argued that *nowhere* was there any declaration of the individual liability of stockholders. Therefore they have said that there was nothing to the statute but a remedy. It needs only a glance at the statutes for the Court to realize that the Legislature enacted them mindful of the Constitutional provision. The exceptions in the statutes relating to railway, religious and charitable corporations are the same as those in the Constiution. Obviously the Legislature thought it unnecessary to say again what had already been said in the most powerful statute of the State.

*(b)* It does not require, therefore, any decisions of Kansas Courts to make parallel the provisions of the Kansas Constitution and statute to the provisions of the Federal statute relating to stockholders in national banks. Concerning the liability under the last mentioned statute, it has been said in the Supreme Court.

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

*Richmond vs. Irons*, 121 U. S., 27, 55.

*(c)* We call particularly to the attention of the Court the cases of *Flash vs. Conn*, 109 U. S., 371, and *Huntington vs. Attrill*, 146 U. S., 657. Each of these cases leads along different lines to the same result, namely, that the liability should be enforced outside of the State of Kansas. *Flash vs. Conn* rests its decision upon the ground that the decisions of the Court of that State should control whose Legislature has enacted the statute. If that State Court says that the liability is contractual it should be enforced outside of the State; if it says that the liability is penal it should not be enforced outside of the State. *Huntington vs. Attrill* goes much further than this, holding that all so-called statutory liabilities should be enforced outside of the limits of the State enacting them, unless they are penalties of a criminal or quasi-criminal nature. To evade the force of this last decision, the petitioner must contend not only that the Kansas provisions create a mere penal liability; but, more than that, he must contend that there really was no right at all secured to the creditor by these provisions; that they only amount to some special remedy not founded upon

a right, if such a remedy could exist. It is manifest from the language of the statutes that such was not the intent of the Kansas Legislature ; and, had the Legislature had any such intent, it would have been impossible for it to give it effect, as such intent would have been contrary to the provisions of the Kansas Constitution.

*(d)* From any of the above points of view, the Circuit Court of the United States for the Southern District of New York had precisely the same jurisdiction over the subject of this action as any Federal or State Court sitting within the territorial limits of the State of Kansas.

## POINT V.

**The application should be denied.**

WILLIAM B. HORNBLOWER,
HOWARD A. TAYLOR,
Of Counsel.

# United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN,
Plaintiff in Error,
Defendant below,

AGAINST

NATIONAL BANK OF OXFORD,
Defendant in Error,
Plaintiff below.

## BRIEF FOR DEFENDANT IN ERROR.

The National Bank of Oxford, the defendant in error and the plaintiff below, recovered the judgment now to be reviewed, against George L. Whitman, the plaintiff in error and the defendant below, for the sum of $4,205.48 upon a verdict by the jury rendered under direction of the Court, Hon. HOYT H. WHEELER presiding (fols. 55–57, 71–75). The direction was given upon the following state of facts :

### Statement.

A corporation was duly formed in the year 1886, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City Bank (83–102). Its purpose was a general banking and real estate business (87–88) and its offices were located in Arkansas City,

Cowley County, Kansas (88, 103). Its principal incorporator (90) was the defendant George L. Whitman, a resident of this district (Ans., 46). Mr. Whitman was one of the original directors (89), and has owned from the beginning $100,000 of its capital stock, or half the entire capital stock of the bank (98, 112-113; Ans., 49). For a time the bank was prosperous, as is evidenced by the fact that the defendant received a large amount of dividends (116). But in December, 1890, it suspended payments and made a general assignment for the benefit of its creditors (130–139, 170). From the time of its assignment it completely suspended its business.

About four months prior to its failure the bank endorsed and guaranteed for value and promised to pay two promissory notes (140–155) which were discounted with the plaintiff, a national bank located in Pennsylvania (81–82). It will be noticed that the endorsement was in the name of the Arkansas City Investment Company; but this is explained by the fact that in the year 1889 the name of the bank had been duly changed from the Arkansas City Bank to the Arkansas City Investment Company (119–129). The obligations of the corporation, evidenced by these two notes, were among its unpaid debts at the time of its assignment. The assignee made part payments upon them from time to time, but in 1895 (more than a year after the suspension) they were reduced to the form of a judgment in favor of the plaintiff and against the Arkansas City Investment Company, rendered in the District Court of Kansas, for the sum total of $3,468.30 (175–182). This judgment was rendered upon voluntary general appearance of the corporation, followed by the interposition of an answer. Thereafter an execution was duly issued out of the District Court upon the judgment against the corporation, directed to the Sheriff of Cowley County, and the same was returned wholly unsatisfied (168–170; 182–189). The Sheriff could not find any property whereon to levy the execution, having exercised all possible diligence in endeavoring to find property and

effects of the corporation whereon to levy, and having entirely exhausted the assets and property of the corporation (189). It appears, moreover, that nothing whatever remains in the hands of the assignee (156-168).

When this corporation was formed, the Constitution of the State of Kansas provided, and still provides, as follows:

Constitution, Article XII., Section 2:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

No "*other* means" have been "provided by law." But, for the enforcement of the double liability of stockholders enacted in the Constitution itself there have been special remedies provided by statute, the Legislature, however, at the same time, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of these special remedies. The first of these remedies is as follows:

General Statutes 1868, Ch. 23, Sec. 32; (General Statutes 1889, Sec. 1192):

> "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall

have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly;"

And the Legislature, out of abundant caution, adds the following clause to this section of the statute:

"or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The other remedy is special only in the sense that under the contingency there provided an action (of the ordinary form) may be brought without a preliminary judgment against the corporation. It is as follows:

Section 44 (G. S. 1889, Sec. 1204). "If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and" (the balance of the section relates to a special remedy in favor of a stockholder who, having satisfied his liability, has brought an action for contribution against his brother stockholders).

Section 40 (G. S. 1889, Sec. 1200) gives a statutory definition of what is meant by the phrase "if any corporation be dissolved." It provides:

"Any * * * corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

From the foregoing statement of the facts it will be noticed: An execution has been issued against this corporation, and no property could be found whereon to levy the same, and it was returned unsatisfied; furthermore, the corporation has suspended business for more than a year, leaving various debts unpaid, including the debts on which the judgment in question against the corporation was recovered. It is admitted by the answer in this case that the defendant has not thus far been subjected to any liability as a stockholder of the corporation (Answer, 50). Such individual liability it is the purpose of this suit to enforce.

Our learned opponents have called the liability a statutory one. The appellation is, in our opinion, an entire misnomer. In one sense the liability may be called a constitutional one; but, in the truer sense, it is a contractual one. In other words, when Mr. Whitman made the contract by which he became a stockholder, one legal result thereof was this double liability flowing from the common law, as amended by the Constitution of the State of Kansas. No statute whatever, except the Constitution, was necessary for the support of this suit, as the legal rules in reference to a secondary liability are well settled and have been complied with in the bringing of this action. As, however, there were Kansas statutes, and in order that no unnecessary questions might arise, care was taken that in the commencement of this action no provision of those statutes should be contravened. "Execution has been issued against the corporation" and returned unsatisfied; the corporation "has suspended business for more than a year, leaving the debts in question unpaid." If, therefore, the statutes were intended to shape the liability stated in the Constitution, the plaintiff is within their terms. It does not seek, however, to avail itself of any statutory remedy; it seeks to avail itself of its contract rights as defined by the Constitution of the State of Kansas; and it comes before the Court with the conditions precedent satisfied which obtain in a suit against one secondarily liable, whether those conditions are defined by the common law or by the statutes of the State of Kansas.

## POINTS.

### I.

**Any United States Circuit Court throughout the country, whether in or out of the territorial limits of the State of Kansas, which obtains proper jurisdiction of the parties, will entertain such an action as this.**

On the argument below there was a tendency on the part of our learned opponents to confuse, or rather to intermingle, the various points of law that arose. May we, therefore, be excused in making this preliminary observation : This first point now to be discussed lies at the threshold of our right of action, and we admit the propriety of considering it at the outset. But we insist that if this point be decided in our favor, as was the result below, it should then be passed by absolutely, and that the suit should then be considered as if we were in the United States Circuit Court for the District of Kansas, or in the District Court of the State of Kansas. If the United States Circuit Court for the Southern District of New York has jurisdiction of the subject of this action at all, it must proceed to exercise that jurisdiction according to the constitution and statutes and decisions thereunder of the Kansas Courts.

(a)

*It is settled law* that *any* United States Circuit Court throughout the country, having the requisite jurisdiction by reason of diversity of citizenship and amount involved, and by reason of the residence of parties, and by reason of proper service of process, will entertain any actions except those of a criminal or of a *quasi* criminal nature or those in the nature of a pro-

ceeding *in rem.* Such actions only are confined to the locality where the crime is committed or the *res* is situated. The various refinements heretofore so much discussed, as to whether the liability sought to be enforced in a civil action was penal or tortious or contractual in its nature, have been entirely done away with by the recent case of

*Huntington vs. Attrill*, 146 U. S., 657.

In this case a judgment had been recovered in the State Court of New York against Attrill upon Attrill's liability as a director of a New York State corporation for the debts thereof on account of the filing of a false certificate, the plaintiff Huntington being a creditor of the corporation. Suit was brought upon this judgment in the State of Maryland. The highest Court of the State held that it could go behind the judgment to see the nature of the liability upon which it was recovered, and that upon so doing it appeared that the nature of this liability, both according to the decisions of the Courts of the State of New York and according to the decisions of the Courts of the State of Maryland, was highly penal. It therefore dismissed the bill. On writ of error in the United States Supreme Court to the Court of Appeals of the State of Maryland it was held, in the first place, that a Federal question was involved on account of the " full faith and credit " clause of the Constitution; in the second place, that the Maryland Court *did* have the right to look behind the judgment so as to see the nature of the liability; but, in the third place, that after so doing a liability was apparent, penal in its nature in one sense, but not penal in its nature in an international sense, *and therefore not a liability which could only be enforced in the State whose statutes had created it.* The present Court is doubtless familiar with this case, but we call attention to the following language in the opinion of the Court, rendered by Mr. Justice GRAY (p. 666).

" It will be necessary, in the first place, to consider the true scope and meaning of the funda-

mental maxim of international law, stated by Chief-Justice MARSHALL in the fewest possible words: 'The courts of no country execute the penal laws of another' (*The Antelope*, 10 Wheat. 66, 123). In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language.

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws (*United States vs. Reisinger*, 128 U. S., 398, 402; *United States vs. Chouteau*, 102 U. S., 603, 611). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. * * *

"Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *Private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, con-

sidered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*' (3 Bl. Com., 2). * * *

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this Court in *Dennick vs. Railroad Co.*, 103 U. S., 11. * * *

"The provision of the statute of New York now in question making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts is in no sense a criminal or *quasi* criminal law. * * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. * * *

"The statute was not a penal law in the international sense."

It was therefore held that the Maryland Court should have given full faith and credit to the judgment recovered pursuant to that statute, and the case was remanded to the Maryland Courts for further proceed-

ings not inconsistent with the opinion of the Supreme Court.

The case of *Dennick vs. Railroad Co.*, 103 U. S., 11, which was the precursor of the *Attrill* case, is also directly in point. In this case it was held that the Courts of one State would enforce the liability incurred in any other State on account of the death of a human being in that other State occasioned by negligence and for which a right of action was given by the statute of that other State.

In *Northern Pacific Railroad vs. Babcock*, 154 U. S., 190, both of the above cases were cited and approved, and it was held expressly that all questions relating to the recovery were to be governed by the *lex loci*, and not by the *lex fori*.

Doubtless there will appear in the brief of the plaintiff in error a long argument on his contention that the Kansas statute is penal and that the nature of the liability is penal and not contractual. We differ with our learned opponents on this point ; but in view of the decisions above, the point is entirely immaterial. No one doubts that the liability of a director of a corporation for filing a false report is highly penal as the word is generally understood by the bench and bar. The liability arises from the misconduct of the director, and its extent is in no wise commensurate with the damage done to the creditor. It differs entirely in its nature from the liability sought to be enforced in this suit. But even such a liability can be enforced in the Federal Courts beyond the confines of the State in which it originated and in which the statute creating it was enacted. *A fortiori* can the stockholders' liability in the case at bar be enforced.

**(b)**

We have the support of judicial authority directly upon the point of enforcing this liability of the stockholders of a Kansas corporation outside the territorial limits of the State.

*Rhodes vs. The United States National Bank*, 66 Fed. Rep., 512, decided in 1895, by the Circuit Court of Appeals for the Seventh Circuit, was an action of the precise nature of the one at bar; namely, a suit in Illinois by a creditor of a Kansas corporation to charge a stockholder thereof with the double liability. The Court (p. 516) cites the Constitution and statutes and follows that by citations at length from various decisions of the Supreme Court of the State of Kansas. It holds that the United States Circuit Court for the Northern District of Illinois has jurisdiction over the subject of the action, and affirms the judgment below, holding the defendant liable as a stockholder.

We shall refer to this case again shortly in another connection. We would at present call to the attention of the Court the fact that this is the first decision by any United States Circuit Court of Appeals upon the very liability now sought to be enforced. It would seem that the decision should be followed in the other Circuit Courts of Appeals, for the simple reason that the question is now *stare decisis* in the Circuit Courts of Appeals throughout the country. If we understand the purpose of the Evarts Act, it was not to have a number of separate appellate courts whose decisions might differ without greater disrespect to each other than if a decision of the State Court of New York differed from a decision of the State Court of Illinis, but that there should be practically one Court, although from the necessities and extent of the country it was composed of different judges in different places. There can be no way of obtaining such a result except by following prior decisions of other Circuit Courts of Appeals.

Soon after the decision of the above case, the case of *McVickar vs. Jones*, 70 Fed. Rep, 754, was decided by Judge ALDRICH in the United States Circuit Court for the District of New Hampshire. This was a case of precisely the same nature as the one at bar. Judge ALDRICH held that an action would lie to enforce the liability in the Circuit Court for the District of New

Hampshire. We refer the Court to Judge ALDRICH's opinion for its admirable and lengthy citation of cases.

So, also, *Bank of North America vs. Rindge*, 57 Fed. Rep., 279, which was a case to enforce the same liability. It was held by Judge Ross in the Circuit Court for the District of California that the action would lie in that Circuit Court.

So, also, it has been held in the Supreme Court of the State of Missouri that the action would lie in the State Court of Missouri *(Guerney vs. Moore*, 131 Mo., 650*)*. The following observations of Judge GANTT are pertinent:

> "It does not follow that because the people of this Commonwealth have restricted the liability of stockholders in corporations created by virtue of our own laws to the amount of their stock that they will refuse to enforce in their Courts the contracts of its own citizens who voluntarily go into other States and become stockholders in corporations under their laws, which impose upon stockholders a present liability in excess of the amount of the stock taken. Such a contract is not against public policy; it contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice (pp. 673–674)."

So, also, in the Supreme Court of the State of California, that the action lies in the California state court.

*Ferguson vs. Sherman*, 47 Pac. Rep., 1023 (March, 1897).

The Court takes a very broad view of the liability, and holds that a stockholder in a street-railway corporation is *not* within the constitutional exception relating to "railway corporations."

If the Kansas decisions be pleaded, the action lies in a State Court in Massachusetts.

*Hancock Bank vs. Ellis*, 166 Mass., 414.

The liability has also been upheld in

*Tuttle vs. The National Bank of the Republic*, 48 Ill. Appellate Courts, 481.
*Bank vs. Zinser*, 55 Ill. Appellate Courts, 510.
*Marshall vs. Sherman*, 84 Hun, 186.

For instances of the enforcement of similar liabilities outside of the territorial limits of the State enacting the statute, see

*Flash vs. Conn*, 109 U. S., 371.
*Cuykendall vs. Miles*, 10 Fed. Rep., 342.
*First National Bank vs. Gustin Co.*, 42 Minn., 329.
*Paine vs. Stewart*, 33 Conn., 516.
*Aldrich vs. Anchor Co.*, 24 Oregon, 32.
*Aultman's Appeal*, 98 Pa. State, 505.
*Ex parte Van Riper*, 20 Wend., 614.
*Savings Association vs. O'Brien*, 3 N. Y. Sup., 764.

These Courts, to use the words of Judge LOWELL in the *Cuykendall* case above cited, "have not felt inclined to extend the illiberal and narrow rule of comity, or want of it, which stops all remedies at the line of the State. The venerable maxim that 'he who shares the benefit should share the burden' is just, and should not be local in its operation. It applies with full force to shareholders of a corporation."

There will be found in the opposing brief one or two cases to the contrary of the line of authorities which we have cited. They will be discussed at greater length in a more appropriate place in this brief. So far as their bearing upon the present point is concerned, the following observations of Judge GRAY in his opinion in *Huntington vs. Attrill* are most pertinent:

> "In this country the question of international law must be determined in the first instance by the Court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions

of general jurisprudence which that Court must decide for itself *uncontrolled by local decisions.*"

Cited and approved on this point in *Bauserman vs. Blount*, 147 U. S., 647.

The present United States Circuit Court of Appeals is not bound by the case of *Marshall vs. Sherman*, 148 N. Y., 9; but rather is bound by the rules laid down in *Huntington vs. Attrill*, and by the decision of its sister Circuit Court of Appeals in *Rhodes vs. United States National Bank*. While Congress has been wise in limiting the jurisdiction of the Federal Courts over parties so as practically to require suits to be brought in the defendant's own home, the Supreme Court of the United States has with equal wisdom done away with the technical learning under which the State Courts have so often lent undue aid to their own citizens. The Circuit Court of the United States for the Southern District of New York has as undoubted jurisdiction of the subject of this action as the Circuit Court of the United States for the District of Kansas.

## II.

**The special remedies of the Kansas statutes do not and could not limit "the individual" double "liability of the stockholders" of a Kansas corporation, which liability "secures" the creditor.**

We trust that we have shown in Point I. to the satisfaction of the Court that our cause of action will be enforced in the United States Circuit Court of New York whether the liability out of which it arose was penal or contractual. That being so, almost all of the cases cited by our opponents construing one statute to be penal and

another to be contractual, become immaterial. Almost every one of them which works out an opinion to the effect that a statute is penal concludes its decision upon the broad ground that a penal statute will not be enforced outside of the territory of the State in which it was enacted, because comity does not require it. In some few, however, there will be found a theory that a penal statute will not be enforced in any other State, not so much because comity does not require it, as because there is no *right*, as it were, involved in a penal statute, but merely a remedy. We could, of course, imagine a provision in a constitution or in an ordinary statute which, at the same time that it declared a right, expressly and in terms limited all proceedings to enforce that right to the courts of the State in which it was passed. We do not know of any such statute; there is no limitation of that nature in the constitutional provision of the State of Kansas; it would have have been clearly unconstitutional to have enacted any such provision in a statute of the State of Kansas; and the particular cases to which we allude do not deal with any such *express* limitation. The theory which we are about to criticise is literally that all that exists in a penal statute is the remedy, and (as a corollary) that one State cannot make mere remedies for another's courts.

As a matter of fact, as soon as we undertake to deal with this theory, the Court will see that in truth it too has been overruled by *Huntington vs. Attrill.* Perhaps the *Dennick* and *Babcock* cases show more accurately what we mean. It was there contended that the statutes giving executors or administrators the right to sue for damages for the death of a testator or intestate caused by negligence was a mere statutory remedy unenforcible elsewhere than in the State enacting the statute. It was argued that clearly the killing of the testator by negligence was not a breach of contract, and that the liability was not contractual. But the Court held that to be immaterial. There was a *right* of action involved in the statute, even if not a contractual one, and this right was capable of enforcement

anywhere. Every such case as *Marshall vs. Sherman* or *Lowry vs. Inman*, 46 N. Y., 119, or *Christensen vs. Eno*, 106 N. Y., 97, has been really overruled by *Huntington vs. Attrill*. To the old rule that no legal right exists without a remedy, the proper converse has been pointed out, that no remedies exist except for legal rights.

Yet in order to cover the ground completely, we shall address ourselves in this point to a discussion of the Kansas Constitution and statutes, and shall we think, be able to demonstrate anew that there was an express right given by the Constitution, and that the remedy for the enforcement of that right was not, and could not have been, confined by statute to the Kansas courts.

(a)

As a text for this discussion, it should be noted that a point in the brief has now been reached where we have one of the best settled rules of the United States Supreme Court for our support. As stated in one of its recent decisions, this rule is to the following effect:

> " This Court will adopt the construction of the statutes or constitution given by the Courts of the State, when that construction can be ascertained " *(Fairfield vs. County of Gallatin*, 100 U. S., 47*)*.
>
> This is a leading case upon this rule, and cites many of the earlier cases, giving quotations from their opinions. It holds that the United States Supreme Court will go so far as to change its construction of a statute, when the State Court has changed its construction of the same statute, and when no rights appear to have been acquired under the former decision.

The rule is nowhere better illustrated than in the case of

*Flash vs. Conn*, 109 U. S., 371.

This case came up from the U. S. Circuit Court for Florida, where it was sought to enforce a stockholders' liability under the statutes of the State of New York. The Supreme Court holds it to have been the duty of the Florida Circuit Court in construing that statute to follow the decisions upon that statute of the Courts of the State of New York. It is true that the case does not take the distinction afterwards taken in *Huntington vs. Attrill*, but seems to make the right of enforcement in Florida depend upon the question of whether the statute is penal or contractual in nature. To that extent it must be deemed overruled by *Huntington vs. Attrill*. But it still remains one of many authorities upon the general proposition in reference to the construction of State Constitutions and statutes by State Courts and the consequent duty of the Federal Court to follow such construction. It is particularly in point because it relates to a stockholder's liability, and the manner of and the prerequisites to its enforcement.

For the most recent case in the Supreme Court reiterating this rule, see

*The California Irrigation cases*, 164 U. S., 112.

In *Rhodes vs. United States National Bank* and *Bank of North America vs. Rindge* (cited *supra*), the rule was applied in the construction of this very Kansas Constitution and statute, and it was held that the Federal Courts were concluded by the Kansas decisions, and obliged thereby to enforce the liability.

Indeed, force and effect are given to the rule in the State Courts. For instance, in Massachusetts it had been decided in *Bank of North America vs. Rindge*, 154 Mass., 203, that construing the Kansas Constitution and statute according to the decisions of the State Court of Massachusetts, an action such as that in the case at bar would not lie. Thereupon, a suit was brought in which not only the statutes of Kansas were pleaded in the declaration, but also that as interpreted by the decisions of the Supreme Court of Kansas, the

liability of the defendant as a stockholder was a contractual liability, etc.

*Hancock Bank vs. Ellis*, 166 Mass., 414.

The Court says:

"The liability of the stockholders must be determined according to the law of Kansas. We now have a case where the declaration as we interpret it sets forth that according to the law of Kansas, the defendant is liable to a judgment creditor of the corporation as upon a contract which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this Court (see *Bank of North America vs. Rindge*, 154 Mass., 203), and the alleged liability of the stockholders is of a different character from that which exists in this Commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We can not take judicial notice of the statutes of Kansas, or of their interpretation by the Courts of that state. At this stage, we simply look at the case as the plaintiff presents it.

"The fact that the corporation is in the hands of receivers is immaterial, because under the averments of the declaration the liability of the defendant is directly to the creditors, and the receivers could not enforce it (*Barre National Bank vs. Hingham Manuf. Co.*, 127 Mass., 563, 567, Cook, "Stock and Stockholders," Sec. 218, and cases there cited). The averments are sufficient to set forth that the defendant is such a stockholder

as by the law of Kansas would be liable to the plaintiff. Judgment reversed. Demurrer overruled."

So in *Marshall vs. Sherman*, 148 N. Y., 9, Judge O'BRIEN is careful to say that:

"The complaint contains no allegation as to the meaning or effect of these statutes or of the provision of the constitution quoted, under the adjudications of the Courts of Kansas. We are, therefore, obliged to construe them ourselves with the aid of such rules, and upon such principles as the Courts of this State apply in the construction of such enactments here."

It may yet be that when some pleader is fortunate enough to overcome all the technical objections that arise in the State Court when a suit of this nature is brought, even the Courts of the State of New York will be obliged to give effect to the Kansas Constitution.

In the Federal Court the technical requirements of pleading and proving the Constitution or statutes, and judicial interpretation thereof by the Courts of other States have been done away with from a very early date. The Court takes judicial notice of them.

*Owings vs. Hull*, 9 Peters, 607.
*Hanley vs. Donohue*, 116 U. S. 1, 6.
*Mills vs. Green*, 159 U. S., 651.

(**b**)

These decisions of the Supreme Court of the State of Kansas, are cited one after another in *Rhodes vs. United States National Bank*, quoted *supra*. They cover every point which can be raised in the case at bar, including the one now under discussion.

Before considering them in detail, we invite the attention of the Court for a moment to the language of the Constitution and of the statutes themselves. The Constitution says:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Judge O'BRIEN, in *Marshall vs. Sherman*, states arbitrarily that this provision of the Constitution is not self-executing. But why not? "Dues from corporations shall be secured by individual" double "liability of the stockholders, and such *other* means as shall be provided by law."

Are we to rewrite the language of the Constitution so as to make it read that dues from corporations shall, *if the Legislature so enact*, be secured by individual double liability of the stockholders and such other means as the Legislature shall provide? *If we do that, we not only make the first provision merely tautological to the second, but take away any force whatever from either provision.* We must give the framers of the Constitution the credit of meaning to enact something. And if what they enact is in unambiguous language, why should we not give it reasonable effect? There can be but one reasonable construction of this provision of the Constitution: Corporate creditors shall, at any rate, have for their security double liability of the stockholders; if the Legislature desires to increase this security it has express constitutional permission. The Kansas provision is very different from the provision in the California Constitution, which secures creditors by *such* individual liability of the corporators and other means *as may be prescribed by law.*

It would prolong this brief to an interminable length and would give this particular topic undue importance if we went into an exhaustive discussion of all the clauses in constitutions of the various States which had or had not been held self-executing. In *Willis vs. Mabon*, 48 Minn., 140, it was held that the article of the Minnesota Constitution was self-execut-

ing which read as follows : " Each stockholder in any corporation * * * shall be liable to the amount of stock held or owned by him." This case was decided in 1892. The briefs of counsel on either side, which are given in the report, seem to be most exhaustive, and the opinion of Judge MITCHELL is full in the extreme. We ask the attention of the Court to this opinion. It distinguishes *Morley vs. Thayer* which has been relied upon by our opponents at bar, and criticises the old case of *Groves vs. Slaughter*, 15 Peters, 449. We have not been able to find any later case than *Groves vs. Slaughter* upon this point in the United States Supreme Court. A perusal of the arguments of Webster and Clay in that case, and of the prevailing and dissenting opinions, will convince the present Court that the Supreme Court at that time was more exercised upon the slavery question than it was in deciding correctly the construction of a provision in the Constitution of a State Court. This particular opinion was torn back and forth in the *Dred Scott* decision which shortly succeeded it.

See, also, *Peo. ex rel. McClelland vs. Roberts*, 148 N. Y., 360, where Judge O'BRIEN stated that the Civil Service provisions in the New York Constitution were self-executing.

Without extended discussion it certainly would seem that the provision in the Kansas Constitution is self-executing so far as the double liability of stockholders is concerned.

But however that may be—even if it was necessary to enact a statute for the enforcement of the right so declared—at any rate it was not necessary in such a statute to reiterate the declaration of the right. Our learned opponents on the argument below, having contended to their satisfaction that the clause in the constitution was not self-executing, proceeded then to treat the subject as if the Constitution had never existed; and, finding no express declaration of this right in the statute, they argued that *nowhere* was there any declaration of the individual liability of stockholders.

Therefore they said that there was nothing to the statute but a remedy. It needs only a glance at both of the statutes for the Court to realize that the Legislature enacted them mindful of the constitutional provision. The exceptions in both the statutes relating to railway, religious and charitable corporations are the same as those in the Constitution. Obviously the Legislature thought it unnecessary to say again what had already been said in the most powerful statute of the State.

What actuated the Legislature in supplementing the Constitution by statutes was undoubtedly a desire to provide summary remedies for the enforcement of the constitutional liability, at the same time expressly reserving the ordinary remedy by action. In creating these summary remedies the Legislature naturally formulated the conditions precedent to their use, and did so according to the general rules of law relating to stockholders' liabilities. These rules are tersely stated in Cook on "Stock and Stockholders," 3d Ed., Secs. 218, 219, where an abundance of authorities will be found. It can do no harm to reiterate these rules. We call particularly to the attention of the Court the fact that when once the liability is declared, nothing further is *necessary*, but merely *convenient* either in the line of summary remedies or in the line of a codification of the law relating to the enforcement of such liabilities.

> "SEC. 218. THE STATUTORY LIABILITY CAN BE ENFORCED BY CORPORATE CREDITORS ONLY.—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a Re-

ceiver of an insolvent corporation, invested with 'all the estate, property and equitable interests' of the concern, has no power to enforce such a liability as this.

"SEC. 219. JUDGMENT AND EXECUTION MUST BE OBTAINED AGAINST THE CORPORATION BEFORE THE STOCKHOLDER'S STATUTORY LIABILITY CAN BE ENFORCED.—Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. This rule arises from the fact that the liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource."

"Frequently the statutes which impose this extraordinary or *extra* common-law liability upon shareholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied thereunder shall have been returned wholly or partially unsatisfied before the creditor has a right to proceed against the stockholders individually. But, in general, proceedings against the corporation are not to be required when they would be nugatory or impossible."

The first of the two statutory provisions in Kansas is for the ordinary case of judgment obtained against the corporation, execution issued and returned unsatisfied. With those conditions precedent fulfilled, the creditor may at once issue a summary execution against stockholders of the corporation, or he may "proceed by action" in cases where it is not feasible to take such short proceeding. It will be noticed that the formulation of the conditions precedent to the issuance of an execution against the stockholder, or to procedure by action, result merely in a reiteration of the general rules, as

above stated. It, therefore, is unnecessary to debate whether the conditions precedent stated in the statute are obligatory to a procedure by action, because the same conditions precedent are obligatory to an action of this nature, even if not expressly so stated by statute. (The nature of the effect upon the stockholder of the judgment against the corporation will be the subject of special comment by us shortly, because it has been so much dwelt upon by the other side.) In the case at bar, we have obtained the judgment, execution has been issued and returned unsatisfied. We have, therefore, satisfied the conditions precedent of the statute, and have satisfied, as well, the conditions precedent as laid down in the general rules of law upon this subject.

The second statute provides for the peculiar contingency that occurs when the corporation has completely suspended business. In such a case it would be "nugatory or impossible" to require the entry of a judgment and the issuance and return of an execution (see observations of Judge WOOD in *Flash vs. Conn*, at p. 380). The statute therefore dispenses with this requirement, and provides that, when a corporation has suspended business for more than a year, action may be brought against the stockholders on the original debt and without joinder of the corporation. The only special *remedy* in this latter statute does not relate to the action against the stockholder, but relates to the action which the stockholder who has satisfied his liability may have on that account for contribution against his brother stockholders. He "may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable," and if he obtains judgment he may have a peculiar and flexible execution. Obviously there is nothing in the statute which would limit his right to sue for contribution elsewhere than in Kansas, the statute merely intending to enact that if he does sue for contribution in Kansas he may have this peculiar remedy by execution. What proceedings, however, he may take for contribution certainly can have no effect in limiting the right to proceed against him for the

original recovery. The very fact that contribution is contemplated shows that the Legislature had in mind an absolute liabil[illegible] on his part to the creditor. The burden is put upon the stockholder to seek contribution, and not upon the creditor by only permitting him to obtain from one stockholder his proportionate share. In the case at bar it will be noticed that we are within the conditions precedent stated in this statute for a suit against a stockholder. The corporation has suspended business for more than a year prior to the institution of this action, and we have proved the original obligations which were debts unpaid at the time of its suspension.

Unquestionably in neither of these two statutes did the Legislature have any intention of limiting the right declared in the Constitution, by granting exclusive remedies for its enforcement. Unquestionably, also, if the Legislature had had any such intention, it would have been unconstitutional. Any remedy which by its lack of efficiency substantially impairs a right given by a Constitution is for that reason unconstitutional. As an instance of this, the Court will bear in mind the well known rule that a Statute of Limitations so short as to hinder even the diligent, is unconstitutional. Our right against Mr. Whitman is practically gone unless we can enforce our remedies in the State of New York. The right was given us in the broadest terms in the Constitution, and no statute of the State of Kansas could have deprived us of it, even if such had been the object.

With these preliminary observations, we come to the consideration of the Kansas decisions, and find that the rules there laid down are the natural and sensible construction of the Constitution and statutes, and therefore merit consideration for their soundness as well as respect for their authority.

(c)

*Howell vs. Manglesdorf*, 33 Kan., 194. In this case the Court is construing Section 32 of the statute, and remarks as follows :

> " It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case, the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the Court where the judgment was rendered against the corporation ; in the other, by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired."

It then shows why the summary proceeding by motion is only available where the notice is served within the State of Kansas, and concludes that :

> " This ruling does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Our learned opponents made earnest contention in the Court below to the effect that the concluding observations of the Court in the above cited case were *dicta*. There are some *dicta* which are entirely *obiter*, and there are other *dicta* which are necessarily involved in the decision of the Court. The *dictum* above, if *dictum* at all, is of the latter nature. It was, to use the language of Judge WHEELER in his opinion below,

"so before the Court in construing the provisions of the Constitution and statutes together that it appears to have received full consideration."

See, also, *Hentig vs. James*, 22 Kan., 326, to the same effect.

Moreover, the general nature of the liability is construed in the *Howell* case. The Court expressly holds that "the liability to the creditors of the corporation is in the nature of a *guaranty*." This is amplified at great length in some later decisions of the Kansas Court.

*Abbey vs. The Dry Goods Co.*, 44 Kansas, 415. The direct point decided by this case was that in enforcing the stockholders' liability, action *must* be against each particular stockholder, and that it was improper to join various stockholders. The case shows that the statute was merely an endeavor to formulate the ordinary rules of law relating to this class of actions.

(**d**)

A word about the judgment in Kansas against the corporation, as evidence against the stockholder to establish the debt of the corporation.

In *Glenn vs. Liggett*, 135 U. S., 533, it was held in reference to the effect of a judgment in Virginia under certain statutes of Virginia, that the rights of the parties must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.

That case held, moreover, that the judgment in that case could only be reviewed or impeached collaterally for lack of jurisdiction or for fraud.

So in *Hawkins vs. Glenn*, 131 U. S., 319, it was said:

"A stockholder is bound by a decree of a Court of Equity against the corporation in enforcement

> of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member."

The above citations state the general rule, and it is in no wise better reiterated than in the Kansas decision of *Grund vs. Tucker*, 5 Kans., 70. That case is the settled law of Kansas, and therefore the law to be applied in the case at bar. Some portions of the opinion are not material, because they do not apply to the present Kansas statute. The following are, however, in point :

> " The next important question is, is a judgment against a corporation *prima facie* evidence of the claim in an action against a stockholder? This has been decided both ways so often in New York that the law on that point must be considered in a state of uncertainty. In an early case it was held that the defendants were chargeable with the judgment, on the principle that the trustees, as the agents of the stockholders, had contracted the debt and fixed the liability, and that the stockholders could impeach the consideration of the indebtedness upon no other ground than that of fraud or error in the litigation; nor could this be done without laying the foundation for it in the pleadings. ' We must regard the judgment ' says Chief-Justice SPENCER, ' as a solemn admission of indebtedness, but it is not binding as a *res adjudicata* upon the stockholders if it was procured by fraud or founded in error ' (Slee vs. Bloom, 20 Johns., 669). And this, it seems to us, is sound doctrine that can be sustained on principle as well as by authority. A judgment against a corporation is of itself one of the ' highest evidences of indebted- known to the law ; ' it is a solemn admission of record that the corporation owes the amount for which judgment is rendered. * * *

"The judgment included interest on the judgment against the corporation. If the original judgment was evidence of an ascertained debt, the responsibility of the corporation, this was correctly done."

The comments of the learned Court as to the state of the authorities in the New York Courts is strictly true. But those latter authorities are none of them authorities in the case at bar, inasmuch as we must look to the Kansas Courts, and if we find nothing there, then to the United States Supreme Court.

The nature of the liability of the stockholder, consequent upon the entry of the judgment against the corporation, is also discussed in the Missouri case in which the Kansas stockholder's liability was enforced. *Guerney vs. Moore*, quoted *supra*. We refer the Court to the opinion in that case. It approves of the case of *Grund vs. Tucker*.

See also *Holland vs. Duluth Iron Co.*, 68 N. W. Rep., 50 (Supreme Court of Minnesota), which is a very well considered case, and holds to the same effect.

There is an obvious distinction between a case in which it is sought to prove by the corporate records, or by what the corporation has done, that a certain person *is* a stockholder in a corporation, and the case in which it is sought to fasten upon one who is unquestionably a stockholder in a corporation a liability for what that corporation has done or suffered done.

We have discussed this question of the effect of the Kansas judgment in order that we should not appear to overlook any point made by our adversaries. It is, however, wholly immaterial for the purposes of this case what view this Court may take as to the force or effect of the Kansas judgment. If the Kansas judgment conclusively establishes as against the stockholder the indebtedness of the corporation, then we have conclusively established it in this case as against this defendant. If the judgment is only *prima facie* evidence

as against the stockholder of the indebtedness of the corporation, then we have established the indebtedness *prima facie* as against the defendant; and, there being an absence of any evidence to the contrary, the *prima facie* case becomes conclusive. If the judgment be no evidence of the corporate indebtedness as against a stockholder, and if it be necessary to prove the indebtedness *de novo*, we have complied with this requirement, having established by independent evidence the indebtedness of the corporation, which is the basis of the liability sought to be enforced. So far as the obtaining of a judgment against the corporation may be a condition precedent to the bringing of an action against the stockholder, we have complied with this condition precedent by obtaining the judgment and putting it in evidence on the trial of this case.

In any view, therefore, of this question of law, we have established our cause of action against the defendant, either by the judgment or outside of the judgment. (We will discuss hereafter the technical point made, of the irregularity of the judgment as against the corporation.)

(e)

We distinctly take issue with our learned opponents in their attempts to distinguish the Kansas Constitution and statutes from the provisions of the National Banking Act and the provisions of the act of the State of New York. The wording of the Kansas Constitution is almost precisely the same as the declaration in the National Banking Act, that stockholders "shall be held individually responsible for all contracts," etc., "to the extent, etc." Almost the same words are used in the New York act, namely, "individually liable for all debts and contracts," etc.

The cases of *Richmond vs. Irons*, 121 U. S., 27, and *Wiles vs. Suydam*, 64 N. Y., 173, and the various other New York cases cited in *Flash vs. Conn*, are, in our

opinion, direct authorities in our favor upon this point. See also Morawetz, Sections 872–877.

The only distinction which to our mind rests upon any reason, is that between the liability (of a director) for misconduct, and the liability (of a stockholder) which springs into existence by means of his stockholding, and for that reason alone. If a director fails to perform the duties imposed upon him by law or under the statutes, then he may be visited with certain statutory penalties for his misconduct. This dereliction of duty on his part is tortious, and as his liability under the statute is often more than commensurate with the damage done to the creditors by his dereliction, his liability is in the nature of a penalty. But the stockholder is guilty of no misconduct. His liability is strictly contractual. Were there no corporation, he would be liable as a partner; that is, as one of the principals. There being a corporation, his liability is limited by the common law to the amount of stock held by him; but by the Constitution of Kansas this is again increased to a liability for double the amount of the stock held by him. These liabilities he takes upon himself by the contract of becoming a stockholder under which he contracts to share in the corporate assets and in the corporate profits, without subjecting himself to more than a limited liability for its losses. The common law is read into his agreement to become a stockholder, but no more and no less than is the Kansas Constitution read into his agreement to become a stockholder in a Kansas corporation.

In *Ferguson vs. Sherman* (cited *supra*) the Court discusses this particular point at length, and makes its decision depend upon it.

## III.

**The action was properly brought against one stockholder rather than several, and by suit at common law rather than in equity.**

As the point of defect of parties was not taken by demurrer, and as the question now suggested was not discussed below, and as it is not now presented by any exception or assignment of error, we do not dwell upon it. Suffice to say:

*Abbey vs. The Dry Goods Co.*, 44 Kan., 415, settles the rule in Kansas, and therefore the rule which should be followed elsewhere. See also Kansas general statutes, 1889, Section 4087, abolishing distinctions between suits at law and in equity, and Sections 1098 and 1101 prescribing that all joint liabilities shall be considered several as well.

The question is discussed at length in *Mc Vickar vs. Jones*, quoted *supra*, under the second, third and fourth grounds of demurer. Judge ALDRICH upholds the action in the form which we have adopted, and cites a large number of cases. Of these cases we particularly call to the attention of the Court the case of

*Mills vs. Scott*, 99 U. S., 25.
*Flash vs. Conn*, 109 U. S., 371, also treats of this precise question, and so does
*Rhodes vs. U. S. National Bank*, cited *supra*.
*Swancoat vs. Remsen*, 78 Fed. Rep., 592.

Finally, the case of *Auer vs. Lombard*, 72 Fed. Rep., 209, decided last year in the Circuit Court of Appeals for the First Circuit, lays down the general rule under all these statutes that the remedy is at law only and against each particular stockholder. We refer the Court to Judge PUTNAM'S opinion, which discusses all the cases. So

*Weeks vs. Love*, 50 N. Y., 568.
*Ferguson vs. Sherman*, cited *supra*.

The rule, certainly in the Federal Court, is settled beyond peradventure.

## IV.

## The Cases on Which the Plaintiff in Error Relies.

*Marshall vs. Sherman*, 148 N. Y., 9:

This case is not in point, because it refuses to take notice of or to follow the Kansas decisions. Apart from that, it is substantially in conflict with the doctrine of *Huntington vs. Attrill.* Again, it is contrary to the former decisions of the same Court, such as *Cochran vs. Wiechers*, 119 N. Y., 399, and other New York cases above cited, holding that a liability of this nature is contractual and not penal. Again, it is contrary to such a case as *Weeks vs. Love*, 50 N. Y., 568, and all the New York cases cited in *Flash vs. Conn*, on the point that the remedy is at law, and suit will lie against a single stockholder. This is substantially admitted in the decision:

> "It would perhaps be impossible to state the principle upon which the decision should rest without (apparently) coming in conflict with some of the numerous cases on the subject at some point" (p. 28).

To read the entire opinion of the Court is the best criticism upon it.

So far as *Lowry vs. Inman*, 46 N. Y., 119, and *Christensen vs. Eno*, 106 N. Y., 97, are concerned, it is easy to distinguish the nature of the statutes involved in those cases. Both of them lack the fundamental declaration of the right which is contained in the Kansas Constitution. In *Savings Society of St. Louis vs. O'Brien*, a case decided in 1889 by the General

Term of the Supreme Court, and reported in 3 N. Y. Supp., 764, statutes of this nature are sufficiently distinguished. The law, as stated in this latter case, would be applicable to the instance of the Kansas Constitution. And it was good law in the State Courts of New York until the decision of *Marshall vs. Sherman.* But the doctrine of all these cases is *contra* to *Huntington vs. Attrill.*

In reference to the decision of the State Court of Massachusetts in *Bank of North America vs. Rindge*, 154 Mass., 203, the Court only a year later, in *Hancock N. B. vs. Ellis*, cited *supra*, has prepared the way by which it will shortly entirely overrule its prior decision. This later case has already been referred to above.

The third State Court on which our opponents rely is that of Illinois. Surely this Federal Court will not consider the ruling of the Courts of that State when the Federal Circuit Court of Appeals, which has jurisdiction in that State, has directly passed upon this very question. Moreover, the decisions of the State Court have only illustrated the lengths to which some State Courts carry the policy of protecting their own citizens. In the first case in the Illinois State Court, the Appellate Court, which is equivalent to our Appellate Division, supported the right of a creditor to proceed outside the State of Kansas, (*Tuttle vs. National Bank of the Republic*, 48 Illinois Appelate Court Rep., 451). Shortly after that was decided, the Supreme Court of the State, in *Fowler vs. Lamson*, 146 Ill. 472, proceeded to hold that the Constitution of Kansas was self-executing, but that the two special remedies provided by the statute prevented the Constitution from executing itself outside the limits of the State of Kansas. The character of this decision was such as to cause the Appellate Division to pass it by in *Bank vs. Zinser*, 55 Ill., Appellate Court Rep., 510. Meanwhile the *Tuttle* case had gone to the Supreme Court, and a decision was first handed down which appeared in the "National Corporation Reporter" of Chicago, 20 December, 1894 (Vol. 9, p. 316),

distinguishing *Fowler vs. Lamson* on the ground that in that case the original judgment had been recovered in another State than Kansas, and affirming the decision of the Appellate Court (It is referred to in the opinion in *Bank vs. Zinser*). This decision was in some way rescinded, and eventually the Court, by a vote of four to three, held that the Constitution was *not* selfexecuting, and that therefore the liability would not be enforced (161 Ill., 497). The able dissenting opinion in that case has a valuable citation of cases. It is therefore apparent that most of the Judges in the State of Illinois before whom this question has come are of the opinion that the action will lie, and that the four Judges who have brought about the rule finally laid down in the *Tuttle* case have first changed their minds as to whether the action would lie, and then have changed their minds back again, the second time, however, giving different reasons than before their first change.

## V.

## Discussion of the Assignments of Error in Detail.

First, Second and Third:

These relate to the competency of our proof that the corporation changed its name. It is to be borne in mind that this testimony was not directed to the proof of any of the important contractual relationships on which our cause of action was founded ; but was merely of a fact explanatory in its nature; namely, to show why the corporation, originally having one name, had another name at the time when it endorsed the notes in question and at the time of its suspension. Viewing all the testimony on this subject (119-129), we do not think that, under the circumstances, any of the ques-

tions were incompetent on the ground that they called for secondary evidence without proper foundation. But, however that may be as to the preliminary questions, surely the offer in evidence of Exhibit 3, being a properly authenticated copy of the original certificate of change of name filed in the office of the Secretary of State of Kansas, was sufficient proof of the change of name. The filing of this certificate is the statutory method prescribed for a change of name. Corporation Act, Ch. 23, Laws of 1868, Sec. 11, provides that every corporation as such shall have the power to change its Corporate name. Section 12 provides:

> "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation."

The certificate in question complies with this statute.

Fourth, Fifth and Sixth:

The proof of the original indebtedness was material and relevant; first, in order to satisfy the conditions precedent of the second statute under which, when a corporation had suspended business for more than a year, suit might be brought against stockholders without preliminary judgment against the corporation; and, secondly, to rebut any attack upon the judgment itself by showing that the judgment was the only one that properly could have been entered. If the Court decides that neither of these reasons is sufficient, its decision must be based upon the fact that the Kansas judgment was all the proof that was necessary. If so, the admission of this additional testimony was clearly harmless error.

Seventh:

So, too, the proof by plaintiff's Exhibit 7 (160-168), that no assets remained in the hands of the assignee,

was merely out of abundant caution. We agree that the return unsatisfied of the execution was, both under the general rules of law relating to this subject and under the statute, the only condition precedent necessary to the institution of this action.

See

*Thompson on Liability of Stockholders*, Sec. 320, and cases there cited.
*Thornton vs. Lane*, 11 Ga., 459, 514.
*Barrick vs. Gifford*, 47 Ohio St., 180.

The assignee had nothing to do with the matter.
*Hancock National Bank vs. Ellis*, 166 Mass., 414.

But, if out of abundant caution, we have committed error in bringing this immaterial testimony into the case, it in no way prejudiced the plaintiff in error.

Eighth and Ninth:

The reason for the offer in evidence of the Kansas judgment and of the execution thereunder and of its return, has been sufficiently discussed in Point II.

Tenth, Eleventh, Twelfth and Thirteenth:

These assignments of error involve the matters discussed by us in Points I. and II. The only matter that requires any further mention is one particular ground taken by the defendant on his motion to direct a verdict.

It appears that the suit in Kansas was begun by voluntary appearance of the corporation, and that such appearance was signed "The Arkansas City Investment Company, by J. L. Huey, Cashier and Managing Officer" (245). As appears by the judgment (178–183), an answer on the part of the corporation was interposed, the answer being filed by a *Kansas attorney at law*. (See stipulation, last page.) To this answer a reply was interposed by the plaintiff, and there seems to have been a regular trial by the Court. In other words, the judgment was

entered, not upon default in appearance or in pleading, but upon full appearance and pleading by one who is presumably an attorney at law and who presumably was duly authorized to represent the defendant in this case. Some point is made that, at the time of the service of the appearance, Huey was not the cashier; and the defendant, in support of the contention, points to Huey's testimony taken at the trial (102, 103). The reading of the testimony shows that Huey did not mean to testify to a resignation as cashier at the time when the corporation made an assignment, but merely to testify that he did not thereafter perform the ordinary duties of a cashier, as the corporation thereafter completely suspended its business. But if it be considered that this evidence did tend to show that Huey was not cashier at the time when the appearance was interposed, the appearance itself is some evidence to the contrary, and the defendant, therefore, should have asked to go to the jury upon that point (see *Fearing vs. Glenn*, 73 Fed. Rep., 116). Instead of that, both he and the plaintiff moved for a direction of a verdict, and thereby left to the Court the decision upon any dispute as to the testimony. But suppose Huey was not the cashier or managing officer, and bore absolutely no relation to the corporation. At any rate, an answer was interposed by one who purported to be an attorney at law, and who purported to represent the corporation in the suit. The corporation was still in existence for the purpose of suing and being sued.

See

*Hawkins vs. Glenn*, 131 U. S., 319.
Kansas General Statutes, Sec. 1200.
Also, numerous cases cited in Bliss N. Y. Code, 4th Ed., Vol. II., p. 2312.

It had not been dissolved in any other sense than in the sense that it had made an assignment and suspended business for more than a year prior to that date. It is true that the complaint alleges that the corporation was dissolved by a court of competent jurisdiction, but that allegation is put in issue by the answer, and the proof fails to show such dissolution. The state-

ment in the complaint was upon information and belief, and the affiant labored under a misapprehension in respect to that fact. The corporation never has been dissolved by any Court. This really appears affirmatively (160-169). The Kansas statutes, General Statutes, 1889, Sections 4146–4147, are substantially like those in the State of New York. They provide that a voluntary appearance or an answer shall be equivalent to service of summons, and they permit also a summons to be served upon a corporation by delivery to its cashier or managing agent.

Sifted down, the only question involved in this point is whether, in proving a judgment of a Court of a sister State, it is necessary affirmatively to prove the facts on which jurisdiction of the Court over the parties rested, or whether a presumption of fact is established by the entry of the judgment and the recitals therein. There can be but one answer to this question. The Court takes notice that the District Court of Kansas is a Court of general jurisdiction. It is perfectly well settled that where such a Court by the entry of the judgment has asserted jurisdiction, the burden rests upon those who deny it, whether the judgment be offered in evidence in a Court of the same State or in a Court of a sister State. It is true that, when the judgment is offered in evidence in a Court of a sister State, it is open to more kinds of collateral attacks than if it be offered in evidence in a Court of the same State. See, for instance,

*Hall vs. Lanning*, 91 U. S., 160.
*Ferguson vs. Crawford*, 70 N. Y., 253.

But the attack must be based upon some facts. *Hall vs. Lanning* was reversed because the defendant's offer of affirmative proof at the trial was rejected. He offered to prove affirmatively that the defendants in the original suit had been partners, but that, prior to the commencement of the suit, the partnership had been dissolved; furthermore, that the *only* authority for an appearance in his behalf was an authorization by his former partner, the other defendant. The well-settled rule of law was

then applied—that a former partner had no such authority, and that the appearance, therefore, would have been shown to be entirely unauthorized, and that, being offered in evidence in a foreign Court, the judgment could be attacked collaterally therefor. So, in the present case, if it had been *proved* that Mr. Atkinson was not an attorney at law, or that he had not received authority from the Board of Directors or from the proper officer of the corporation to interpose an answer, the judgment might be attacked collaterally. But there was a corporation for whom he interposed an answer. It had a Board of Directors; it had officers. There was some one who could have authorized that appearance and the interposition of that answer, and presumably the proper person did it. If Mr. Whitman did not like the Board of Directors, or did not like the officers, he owned half the stock, and had it in his power to change them. The following cases will suffice to sustain our position as above:

*Tenney vs. Townsend*, 9 Blatch., 274.
*White vs. Crow*, 17 Fed. Rep., 98.
Freeman on Judgments, 4th Ed., Secs. 124, 128, 565.
*Pillsbury vs. Dugan*, 9 Ohio St., 117.

And, after all, the judgment was not necessary.

*Flash vs. Conn.*, 109 N. Y., 371.
*Hardman vs. Sage*, 124 N. Y., 25.

It is even expressly waived as a condition precedent in such a suit as the present, when the corporation has suspended business for more than twelve months.

## VI.

**The judgment should be affirmed.**

William B. Hornblower,
Howard A. Taylor,
Of Counsel.

# Supreme Court of the United States,

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|---|---|
| GEORGE L. WHITMAN, Petitioner, AGAINST THE NATIONAL BANK OF OXFORD, Respondent. | October Te m, 1898. No. 182. |

## BRIEF FOR RESPONDENT.

This cause comes before this Court on a writ of *certiorari* granted by this Court to review a decision (fols. 83-96) of the Circuit Court of Appeals for the Second Circuit, affirming a judgment of the Circuit Court of the United States for the Southern District of New York, in favor of the present respondent, the National Bank of Oxford, and against the petitioner George L. Whitman. The judgment was upon suit by the present respondent, amounted to $4,205.48, and was entered upon a verdict by a jury rendered under direction of the Circuit Court (19-26.)

### Statement.

A corporation was duly formed in the year 1886, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City Bank (28-34). Its purpose was a general banking and real estate business (29,30) and its offices were located in Arkansas City, Cowley County, Kansas (30, 35). Its principal incorporator (30) was the petitioner George L. Whitman. Mr. Whitman was one of the original directors (30), and has owned from the beginning $100,000 of its capital stock, or half the entire capital stock of the

bank (17, 33, 38, 39). For a time the bank was prosperous, as is evidenced by the fact that the petitioner received a large amount of dividends (39). But in December, 1890, it suspended payments and made a general assignment for the benefit of its creditors (44–47, 57). From the time of its assignment it completely suspended its business.

About four months prior to its failure the bank endorsed and guaranteed for value and promised to pay two promissory notes (47–52), which were discounted with the respondent, a national bank located in Pennsylvania. It will be noticed that the endorsement was in the name of the Arkansas City Investment Company; this is explained by the fact that in the year 1889 the name of the bank had been duly changed from the Arkansas City Bank to the Arkansas City Investment Company (40–43). The obligations of the corporation evidenced by these two notes were among its unpaid debts at the time of its assignment. The assignee made part payments upon them from time to time, until in 1895 (more than a year after the suspension) the balances unpaid were reduced to the form of a judgment in favor of the present respondent and against the Arkansas City Investment Company, rendered in the District Court of Kansas, for the sum total of $3,468.30 (59–61). This judgment was rendered upon voluntary general appearance of the corporation, followed by the interposition of an answer through an attorney at law. Thereafter an execution was duly issued out of the District Court upon the judgment against the corporation, directed to the Sheriff of Cowley County, and the same was returned wholly unsatisfied (56, 57, 61–64). The Sheriff could not find any property whereon to levy the execution, having exercised all possible diligence in endeavoring to find property and effects of the corporation whereon to levy, and having entirely exhausted the assets and property of the corporation. It appears, moreover, that nothing whatever remains in the hands of the assignee (52–56).

When this corporation was formed, the Constitution of the State of Kansas provided, and still provides, as follows:

Constitution, Article XII., Section 2:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual

liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

No "*other* means" have been "provided by law." The Legislature has enacted (General Statutes 1868, Ch. 23, Sec. 46; General Statutes 1889, Section 1206): "No stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him."

But, for the enforcement of that individual liability of the stockholders which was enacted in the Constitution itself there have been special remedies provided by statute, the Legislature, however, at the same time, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of the special remedies. The first of these remedies is as follows:

General Statutes 1868, Ch. 23, Sec. 32 (General Statutes 1889, Sec. 1192):

> "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly."

And the Legislature, out of abundant caution, adds the following clause to this section of the statute:

> "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The other remedy is special only in the sense that under the contingency there provided an action (of the ordinary form) may be

brought without a preliminary judgment against the corporation. It is as follows:

> Section 44 (G. S. 1889, Sec. 1204). "If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and" (the balance of the section relates to a special remedy in favor of a stockholder who, having satisfied his liability, has brought an action for contribution against his brother stockholders).

Section 40 (G. S. 1889, Sec. 1200) gives a statutory definition of what is meant by the phrase "if any corporation be dissolved." It provides:

> "Any * * * corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

From the foregoing statement of the facts in this case it will be noticed: An execution has been issued against this corporation, and no property could be found whereon to levy the same, and it was returned unsatisfied; furthermore, the corporation has suspended business for more than a year, leaving various debts unpaid, including the debts (regularly proven also on the trial of this action) on which the judgment in question against the corporation was recovered. It is admitted by the answer in this case that the petitioner has not thus far been subjected to any liability as a stockholder of the corporation.

The petitioner offered no evidence at the trial, and the truth of the facts narrated above was not questioned.

## ARGUMENT.

We have contended successfully in the courts below, and we now contend that :

It is unnecessary in this case to decide whether the liability of a stockholder of a Kansas corporation is penal or contractual in nature, as *Huntington vs. Attrill*, 146 U. S., 657, has settled that the only liability enacted by the Constitution or statutes of one State to which the Courts of another State should not necessarily give effect, is that strict penal liability which only an action of a criminal or of a quasi-criminal nature can enforce. If the provisions of the Kansas Constitution and statutes are only "penal" in the broad sense of the word, the Courts of other States should enforce them.

Such provisions, however, are clearly contractual in nature. This is apparent upon their face. It has also been so determined by the highest Court of Kansas. The construction of the nature of the liability by that Court should be followed elsewhere.

The liability is identical in its nature and extent with the liability of a stockholder of a national bank. The only excuse for any disfavor into which the provisions of the Kansas Constitution and statutes may have fallen in any courts is that the organic law of a Kansas corporation is not as commonly known and borne in mind, both by lawyers and laymen, as are the provisions of the National Banking Act.

Our points do not follow the order of discussion above suggested, because it will be more convenient if we answer *seriatim* each point of the petitioner's brief.

## POINTS.

### I.

**The provision of the Kansas Constitution is, if not self-executing, at least declaratory of a legal relation involving rights and liabilities.**

The Constitution of the State of Kansas amended the liability of a stockholder at common law—which is merely to pay for his stock—by providing that, up to an amount equal to his holdings, he is under an "individual liability" to secure the payment of the dues of the corporation. The Constitution expressly excepted stockholders of railway and charitable corporations. It also gave a free hand to the Legislature, by providing that corporate dues might be secured by "such *other* means as shall be provided by law."

It is contended by our opponents that the liability stated in the constitution is not self-executing, and authorities are cited in support of that view.

Our position is that the amendment of the common-law liability of the stockholder enacted by the Constitution is *not* of a nature where the right thus secured the creditor reaches no further than the expressed remedy, and which fails entirely unless some constitutional or statutory remedy is enacted to give it sanction. The provision, therefore, is self-executing. But our position is, furthermore, that, even were this not so, yet it is perfectly permissible for a transitory remedy to be enacted by the Legislature without a restatement of the liability (already stated in the Constitution) that it is intended to enforce. The Constitution of a State, in respect to such provisions as the one we are considering, is merely a *statute*, which it is difficult to amend and to which contravening statutes must yield. Such provisions as the one now to be considered are part of the *statutes* of the State, by the very fact that they appear in the Constitution, and it is unnecessary to repeat them. The provision of the Constitution is to be read into the charter of every corporation thereafter created in the State of Kansas. It becomes *ipso facto* part of the fundamental law of every such corporation—its articles of association—and no Act of the Legislature can declare otherwise, or is needed to give it effect. Every person who becomes a stockholder in any such corporation

becomes bound as part of his contract of subscription (if he be an original subscriber) or assignee of the original subscriber (if he be a subsequent purchaser) to pay the debt of the corporation up to the amount of his stock. Every person who becomes a creditor of such a corporation has a right to rely on this contractual obligation, and becomes a party to such contractual obligation, and has a right to enforce it in any Court of Jutice having jurisdiction of the person of the stockholder. To limit this right by the boundary of the State is as unreasonable as it is unjust to the stockholders who happen to be citizens of Kansas and upon whom would thus be thrown the entire burden of the constitutional liability.

In respect to our first proposition: There is nothing in the nature of the liability stated in the Constitution which is of such a novel character, or which is so indefinite, as to make the liability in itself incapable of enforcement in any ordinary court. The secondary liability of a surety is a liability the nature of which has been recognized everywhere and for centuries. The extent of it is detailed in and measured by the contract or statute which creates it, and the amount to be paid in exoneration of it can be adjusted in any court exercising the functions of the ordinary court of common law. If it be suggested that in the ordinary case of suretyship the identity of the particular individual is always disclosed in whose favor the suretyship is to exist, the answer is that a liability of the nature stated in the Kansas Constitution is, to a certain extent, a liability in favor of a third party to a contract. Some courts at one time may have been troubled about the theories underlying the enforcement of contracts for the benefit of an outside party, at the instance of such outside party; but it was never thought that, if a court was required either by precedents or by statute to enforce such a liability, it would have any inherent difficulty in so doing.

In short, there is nothing intrinsically difficult in making a stockholder answerable to an extent for the debts of a corporation. It is being done throughout the country under the provisions of the National Banking Act, and no Federal court has yet pleaded incapacity when called upon to ascertain the amount that should properly be paid.

If, therefore, this constitutional provision be not self-executing, it is not on account of the nature of the liability, but because of the words in which it is framed.

The argument is made that the use of the words "shall be" demonstrates the necessity of future legislative enactment. We think not. The words, in our opinion, are those of command—mandatory, it may be said. That is the security that a creditor of a Kansas corporation *shall have*. It is to be borne in mind that when the maker of a constitution phrases its provisions he is looking to the future. A statement that dues from corporations *are* secured by the individual liability of the stockholders would have been an untruthful statement. That was *to be* the rule, and it was appropriately stated by using the words "shall be."

The other construction would practically rewrite the provision, so as to make it read that dues from corporations shall, *if the legislature so enact*, be secured by the individual liability of the stockholders there stated, and by such other means as the legislature shall provide. Writing that extra clause into the provision, we do two things: The first provision becomes merely tautological to the second; and all force whatever is taken from both provisions. The framers of the Constitution should be given the credit of intending to enact something. If what they have enacted is in unambiguous language, there is nothing in the nature of the subject of which we are treating which requires the Courts to detract from its effect.

It would give this particular topic undue importance should we undertake to review all of the authorities upon constitutional provisions which have similar language. We merely refer to *Willis vs. Mahon*, 48 Minn., 140, in which it was held that the article of the Minnesota Constitution was self-executing, which read as follows:

> "Each stockholder in any corporation * * * * * shall be liable to the amount of stock held or owned by him."

This case was decided in 1892. The briefs of counsel on either side are given in the report and seem to have been most exhaustive. Judge MITCHELL'S opinion is very full and reviews all of the cases. It is to be noted that the words "shall be" are contained in the Minnesota Constitution.

*People ex rel. McClelland vs. Roberts*, 148 N. Y., 360, contains an excellent argument in reference to provisions in the New York Constitution, which supports the view we take on this subject.

In reference to the authorities cited under this point by the other side:

*Wells vs. Robb*, 43 Kansas, 201, is very far from a decision that the Kansas Constitution is not self-executing. The phrase "is wholly governed by the *statute*" relates back to the preceding sentence of the opinion. The statute referred to is a "constitutional or statutory provision."

*Barnes vs. Wheaton*, *Marshall vs. Sherman* and *Tuttle vs. The National Bank of the Republic*, are instances of the hostility of the State Courts of New York and Illinois to recoveries upon liabilities of this nature. We shall contend in a subsequent point that the views of the courts in these two States, as to the effect to be given to the liability of a stockholder in a Kansas corporation, are contrary to the views of all the Federal Courts without exception, and contrary to the views of all of the State Courts, except in the instance of the State of Rhode Island. In other words, they are contrary to the general trend of authority. Their arguments in respect to the effect of the constitutional provision form merely one link in the chain of what we respectfully contend to be fallacious reasoning. To take, by way of example, the quotations from the opinion in *Barnes vs. Wehaton* that appear in the brief of the other side. First, the learned Court cites the provision of the Ohio Constitution, the phraseology of which is very different from that of the Kansas provision. In Ohio, the phrase is, "such individual liability and other means as may be prescribed by law." In Kansas, it is, "individual liability and such other means as may be prescribed by law." The learned Court then cites an Ohio case which *upholds* our present contention. Following that is a citation of a California case which was carefully distinguished in *Willis vs. Mabon* on the ground that the phraseology of the provision of the California Constitution was essentially different. Thereupon are cited the two Federal cases upon this point, and a Missouri case. The Missouri case does not help the contention, as the Courts of that State have enforced the liability in the case of Kansas corporations.

In short, the only authorities which it is important to consider in this connection are *Morley vs. Thayer* and *Groves vs. Slaughter*. *Morley vs. Thayer* is the only instance of general hostility on the part of a Federal Court to actions of this nature. It was decided many years ago and its opinion contains many of the views then frequently expressed in the courts which have since been overruled by

the Supreme Court in *Huntington vs. Attrill.* So far as it discusses the particular topic now considered, the reasoning we respectfully submit is not sound. Judge CLIFFORD said: "Power is plainly given to the Legislature in this case to pass laws to render stockholders individually liable." The Legislature would have had that power without any such provision in the Constitution. If that is the only effect to be given to the constitutional provision it has no force at all.

The only authority relied upon by the learned Court is the early case of *Groves vs. Slaughter*; and after a careful search we have been unable to find any other case in the United States Supreme Court bearing upon this point.

*Groves vs. Slaughter* was decided in 1841. The question involved related to slavery. The views of the various members of the Court were greatly criticised in the Dred Scott decision, which shortly succeeded it. Finally, the constitutional provision then held not to be self-executing, differed materially from the one at bar. The provision of the Constitution was: "The introduction of slaves into this State as merchandise or for sale shall be prohibited from and after the first day of May, 1833."

In the leading opinion rendered by Mr. Justice THOMPSON particular stress is placed on the fact that a provision of that nature has no sanction until penalties are enacted. In this respect, if our prior reasoning has been accepted, there lies an important distinction from the provision of the Kansas Constitution.

We have said this much, not because this case turns upon the view of the Court as to this particular topic, but because we think that there has been a thorough misconception as to the scope and effect of a constitutional provision such as the one in the Kansas Constitution. The idea seems to have been that to place a provision of this nature in a constitution of a State rather than in a statute of a State was to relegate it to obscurity. Such is not our view of the subject. The only case which for a moment sanctions this contention in this Court is that of *Groves vs. Slaughter*, and for the reasons which we have heretofore given we do not think that that case is controlling.

Admitting, however, for the purposes of argument, that it was necessary to enact a statute for the enforcement of the right declared in the Constitution, it was not, therefore, necessary in such a statute to reiterate the declaration of the right.

Our learned opponents having contended to their satisfaction that the clause in the Constitution is not self-executing, proceed then to treat this whole question as if the Constitution had never existed; and finding no express declaration of this right in the statute, they argue that nowhere is there any declaration of the individual liability of stockholders. That contention forms the basis of their point, that there is nothing to the statute but the remedy.

An examination of the statutory provisions side by side with the provision of the Constitution shows that they were enacted by the Legislature having in mind the constitutional provision, and that the Legislature deemed it unnecessary to say again what had already been said in the most powerful statute of the State. For instance, Section 40 speaks of the "individual liability." There is nothing else to which that statute could refer than the language of the Constitution. Again, in both Sections 32 and 44 there is the Constitutional exception relating to railway, religious and charitable institutions. *Moreover, Section 46 is a practical re-statement of the constitutional provision.*

In the National Banking Act one section states the liability of the shareholder, while another sketches a remedy. It might as well be contended that the separation into sections deprived each section of any value as to contend that the separation between the Kansas Constitution and the Kansas statute rendered both nugatory. If what was stated in the Constitution had been stated in Section 32 and Section 44 of the Statute, the entire argument of the petitioner's counselwould fail. Does it not then become a manifestly illogical and fallacious argument?

## II.

**Having in mind the Constitutional provision as a declaration, even if not self-executing, the special remedies of the statute become merely additional remedies to the ordinary one by an action in any court of record.**

What actuated the Legislature in supplementing the Constitution by any statutes seems to have been a desire to provide sum-

mary remedies for the enforcement of the constitutional liability, at the same time expressly reserving the ordinary remedy by action. In creating these remedies the Legislature naturally formulated the conditions precedent to their use, and did so according to the general rules of law relating to stockholders' liability.

The third edition of Mr. Cook's work on Stock and Stockholders cites an abundance of authorities in support of its terse general statement of these rules. The particular point to which we wish to direct attention is that *when once the liability is declared*, nothing more is *necessary* by way of a remedy, but all provisions in addition are merely *convenient*, either in the line of providing summary remedies or of codifying the law relating to the enforcement of the liability.

> "SEC. 218. THE STATUTORY LIABILITY CAN BE ENFORCED BY CORPORATE CREDITORS ONLY.—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a Receiver of an insolvent corporation, invested with 'all the estate, property and equitable interests' of the concern, has no power to enforce such a liability as this.
>
> "SEC. 219. JUDGMENT AND EXECUTION MUST BE OBTAINED AGAINST THE CORPORATION BEFORE THE STOCKHOLDER'S STATUTORY LIABILITY CAN BE ENFORCED.—Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. This rule arises from the fact that liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource."
>
> "Frequently the statutes which impose this extraordinary or *extra* common-law liability upon shareholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied thereunder shall have been

> returned wholly or partially unsatisfied before the creditor has a right to proceed against the stockholders individually. But, in general, proceedings against the corporation are not to be required when they would be nugatory or impossible."

The first of the two statutory provisions in Kansas is for the ordinary case of judgment obtained against the corporation, execution issued and returned unsatisfied. With those conditions precedent fulfilled, the creditor may at once issue a summary execution against stockholders of the corporation, or he may "proceed by action" in cases where it is not feasible to take such short proceeding. It will be noticed that the formulation of the conditions precedent to the issuance of an execution against the stockholder, or to procedure by action, result merely in a reiteration of the general rules, as stated in the citation from Cook. It, therefore, is unnecessary to debate whether the conditions precedent stated in the statute are obligatory to a procedure by action, because the same conditions precedent are obligatory to a suit of this nature even if not so expressly stated by statute.

In the case at bar we have obtained the judgment, execution has been issued and returned unsatisfied. We have, therefore, fulfilled the conditions precedent as stated in the statute and have fulfilled as well the conditions precedent as laid down in the general rules of law upon this subject.

Counsel for the petitioner seek, however, to interject a subtlety from the fact that in a proceeding under this statute the stockholder is compelled to pay a judgment against the corporation, rather than the original indebtedness. No confusion should arise on this account. In the theory of the law the judgment is but a merger of the indebtedness and constitutes substantially the same claim. The judgment is a debt of the corporation just as much as the note on which it was recovered.

The only new question which in some suits against stockholders is presented by the recovery of a judgment, is not involved in the case at bar, viz., the conclusiveness of the effect of the judgment upon the stockholder.

In *Hawkins vs. Glenn*, 131 U. S., 319, the general rule is stated which is followed in Kansas and generally elsewhere, when the subject is presented for adjudication. The Court there says :

> " The stockholder is bound by a decree of a Court of Equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

But the question of the force, effect and conclusiveness of the Kansas judgment is not involved in this case. To quote from the opinion of the learned Judge who delivered the decision of the Court in the Circuit Court of Appeals (86) :

> " It will be observed that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was based, such as the guaranty, the discount and the nonpayment were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established, against the stockholders, the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder."

The theory of the stockholder's liability is that it is a secondary liability for the debts of the corporation. Under the constitutional provision declaring that liability, it might well have been left to the Legislature to say how conclusive should be the effect upon it of a judgment against the corporation. If a surety give his bond in any case, he may agree to be liable by the very fact of the entry of a judgment in a suit to which he is not a party. More often he gives his bond, the liability upon which is to be determined by the result of a suit to which he is privy, although not a party. And if his liabil-

ity be of neither of those natures, and be in no way affected by the entry of the judgment, nevertheless, if in an independent suit brought against him to determine that liability, the debt of the corporation be proved and the merger into the judgment be proved and he be liable for the debt of the corporation, it is obvious that he should pay that judgment of the corporation, which is but a debt of the corporation in its merged form.

Therefore, without citing any of the Kansas decisions upon these statutes but rather examining the question *de novo*, we say that it is a mere subtlety to claim that to charge this stockholder secondarily liable for the debts of this corporation in the way that has been done, is to charge him with a liability totally unknown, not only in extent but in nature, to the class of liabilities that are recognized by the common law.

Counsel pass over the obvious distinction between a case in which it is sought to prove by the corporate records or corporate acts that a certain person *is* a stockholder in a corporation, and the case in which it is sought to fasten upon one who is unquestionably a stockholder in a corporation a liability for what that corporation has done or suffered to be done. The rule may not be logical that the corporate records in themselves prove that one is a stockholder, though even that has been held as *prima facie* true in *Finn vs. Brown*, 142 U. S., 56, but it is strictly logical to hold that when a person is admittedly a stockholder the corporate records shall be evidence of his liability as such.

Nothing in the Kansas decisions renders the situation of a stockholder peculiarly unfortunate. In *Ball vs. Reese*, 58 Kansas, 614, the ordinary rule was laid down, that the judgment is conclusive upon the stockholder in the absence of fraud or lack of jurisdiction. Instances of that rule are

*Glenn vs. Liggett*, 135 U. S., 533.
*Guernsey vs. Moore*, 131 Mo., 650.
*Holland vs. Duluth Iron Co.* (Minn.), 68 N. W. Rep., 50.

Attention is called by our opponents to the situation in respect to Statutes of Limitations. But such statutes merely relate to remedies and have no bearing upon rights and the various classes of rights.

Attention is also directed to the fact that the respondent is recovering interest on the judgment rather than on the debt. To quote from *Grund vs. Tucker*, 5 Kans., 70 :

> "The judgment included interest on the judgment against the corporation. If the original judgment was evidence of an ascertained debt, the responsibility of the corporation, this was correctly done."

In concluding our inquiry into the theory and use of the Kansas statute, we call attention to the fact that, if the Legislature had intended to create a mere remedy, the execution of its intention would have been in contravention of the State Constitution. If the Legislature had sought to limit the right declared in the Constitution by granting exclusive remedies for its enforcement, its statutes to that effect would have been void. Any remedy which by its lack of efficiency substantially impairs a right given by a Constitution, is for that reason unconstitutional. Where a Statute of Limitations has been enacted so short as to hinder even the diligent suitor, the result is unconstitutional.

If the respondent cannot sue the petitioner in the Circuit Court for the Southern District of New York, the constitutional right granted the respondent is practically impaired and done away with. That right was given the respondent by the Constitution of Kansas, in the broadest terms, and no statute of that State could have impaired it, even if such had been its object.

## III.

### The liability can be enforced in any Federal Circuit Court of the United States which has jurisdiction of the parties.

*It is settled law* that *any* United States Circuit Court throughout the country, having the requisite jurisdiction by reason of diversity of citizenship and amount involved, and by reason of the residence of parties, and by reason of proper service of process, will entertain any actions except those of a criminal or of a *quasi* criminal nature or those in the nature of a proceeding *in rem*, which class of actions only are confined to the locality where the crime is committed or the *res* is situated. The various refinements heretofore so much discussed,

as to whether the liability sought to be enforced in a civil action be penal or tortious or contractual in its nature, have been entirely done away with by the recent case of

*Huntington vs. Attrill*, 146 U. S., 657.

In this case a judgment had been recovered in the State Court of New York against Attrill upon Attrill's liability as a director of a New York State corporation for the debts thereof on account of the filing of a false certificate, the plaintiff Huntington being a creditor of the corporation. Suit was brought upon this judgment in the State of Maryland. The highest Court of the State held that it could go behind the judgment to ascertain the nature of the liability upon which it was recovered, and that upon so doing it appeared that the nature of this liability, both according to the decisions of the Courts of the State of New York and according to the decisions of the Courts of the State of Maryland, was highly penal. It therefore dismissed the bill. On writ of error from the United States Supreme Court to the Court of Appeals of the State of Maryland, it was held, in the first place, that a Federal question was involved on account of the "full faith and credit" clause of the Constitution; in the second place that the Maryland Court *did* have the right to look behind the judgment so as to ascertain the nature of the liability; but, in the third place, that after so doing a liability was apparent, penal in its nature in one sense, but not penal in its nature in an international sense, *and therefore not a liability which could only be enforced in the State whose statutes had created it.* Mr. Justice GRAY (p. 666) says:

> "It will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief-Justice MARSHALL in the fewest possible words: 'The courts of no country execute the penal laws of another' (*The Antelope*, 10 Wheat. 66, 123). In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language.
>
> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal and pecuniary, imposed, and enforced by the State, for a crime or offence against its laws (*United States vs. Reisinger*, 128 U. S., 389, 402; *United States vs. Chouteau*, 102 U. S.,

603, 611). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. * * *

"Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *Private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*' (3 Bl Com., 2). * * *

"The question whether the statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purposes is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this Court in *Dennick vs. Railroad Co.*, 103 U. S., 11. * * *

"The provision of the statute of New York now in question making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts is in no sense a criminal or *quasi* criminal law. * * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of

> the creditor only, and measured by the amount of his debt, it as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. * * *
>
> "The statute was not a penal law in the international sense."

It was therefore held that the Maryland Court should have given full faith and credit to the judgment recovered pursuant to that statute, and the case was remanded to the Maryland Courts for further proceedings not inconsistent with the opinion of the Supreme Court.

The case of *Dennick vs. Railroad Co.*, 103 U. S., 11, which was the precursor of the *Attrill* case, is also directly in point. In that case it was held that the Courts of one State would enforce the liability incurred in any other State on account of the death of a human being in that other State occasioned by negligence and for which a right of action was given by the statute of that other State.

In *Northern Pacific Railroad vs. Babcock*, 154 U. S., 190, both of the above cases were cited and approved, and it was held expressly that all questions relating to the recovery were to be governed by the *lex loci*, and not by the *lex fori*.

It follows from these decisions that the Federal Courts should everywhere enforce what have generally been called penal liabilities. The liability of a director of a corporation for filing a false report is highly penal, as the word is generally understood. The liability arises from the misconduct of the director, and in its extent it is in no wise commensurate with the damage done to the creditor. If a statutory liability of that nature is enforceable outside of the State which enacted it, *a fortiori* the present stockholder's liability is likewise so enforceable.

The cases above cited not only change the old rule that a penal statute will not be enforced in another State because comity does not so require, but they overrule the old theory relating to a penal statute, that it could not be enforced elsewhere, because there was no right connected with it, but merely a remedy. Of course, there might be a provision in a Constitution or in an ordinary statute,

which, at the same time that it declared a right, expressly and in terms limited all proceedings to enforce that right to the Courts of the State in which it was passed. Plainly, that is not the situation in Kansas, and the old cases to which we allude do not deal with any such *express limitations*. We are not discussing any such possible statute.

But as to the ordinary statute of the kind, whether "penal" or "contractual," the theory upon which the *Dennick* and *Babcock* cases have been decided shows that there cannot be a penal statute which merely consists of a remedy, without a pre-existent right. For instance, in these cases it was argued that the killing of the testator by negligence was not a breach of contract, and that, therefore, the liability was not contractual. This Court held that to be immaterial. There was a *right* of action involved in the statute, even if not a contractual one, and this right was capable of enforcement anywhere. In other words, this Court has attached to the old rule that no legal rights exist without a remedy, the proper converse that no remedies exist except for legal rights.

If our contentions in this point should be accepted, the Court might be of an opinion adverse to the contentions advanced in our first and second points, and yet the decision should be affirmed.

Before concluding our discussion of this branch of the case, we call attention to the large number of decisions in the Federal Circuit Courts and United States Circuit Courts of Appeals throughout the country, enforcing the Kansas stockholder's liability. We shall treat these cases more in detail under the succeeding point which deals particularly with the obligation of Federal Courts to follow the construction placed by the Courts of a State upon its own constitution and statutes. But at this point it should be noticed that these Federal decisions do not proceed solely upon that one ground. In many of them there is careful, independent reasoning, leading to the same conclusion as that to which the Kansas Courts came. The liability has been enforced in practically every one of the Circuits, and two of the Circuit Courts of Appeals have added the weight of their authority. In the States of Illinois and New York, the decisions were worked out in contravention of the decisions of the State Court of that forum. The more careful consideration was given to the reasons for the Federal decisions on that account. In Massachusetts the Federal Courts have achieved the great triumph of converting the State Court to their

view; the latest decision in the State Court of Massachusetts having practically overruled the earlier decisions.

For instances of the enforcement of similar liabilities outside of the territorial limits of the State enacting the statute, see

*Auer vs. Lombard*, 72 Fed. Rep. 209.
*Flash vs. Conn*, 109 U. S., 371.
*Cuykendall vs. Miles*, 10 Fed. Rep., 342.
*First National Bank vs. Gustin Co.*, 42 Minn., 329.
*Paine vs. Stewart*, 33 Conn., 516.
*Aldrich vs. Anchor Co.*, 24 Oregon, 32.
*Aultman's Appeal*, 98 Pa. State, 505.
*Ex parte Van Riper*, 20 Wend., 614.
*Savings Association vs. O'Brien*, 3 N. Y. Sup., 764.

These Courts, to use the words of Judge LOWELL in the *Cuykendall* case above cited, "have not felt inclined to extend the illiberal and narrow rule of comity, or want of it, which stops all remedies at the line of the State. The venerable maxim that 'he who shares the benefit should share the burden' is just, and should not be local in its operation. It applies with full force to shareholders of a corporation."

## IV.

**The Kansas Courts have construed the nature of the liability in a way that is favorable to our contentions, and Courts elsewhere are bound to follow such construction.**

*(a)*

One of the best-settled rules in this Court is stated in one of its decisions as follows:

> "This Court will adopt the construction of the statutes or constitution given by the Courts of the State, when that construction can be ascertained" *(Fairfield vs. County of Gallatin*, 100 U. S., 47).

This is a leading case upon this rule, and cites many of the earlier cases, giving quotations from their opinions. It holds that the United States Supreme Court will go so far as to change its construction of a statute, when the State Court has changed its construction of the same statute, and when no rights appear to have been acquired under the former decision.

The rule is nowhere better illustrated than in the case of

*Flash vs. Conn*, 109 U. S., 371.

This case came up from the U. S. Circuit Court for Florida, where it was sought to enforce a stockholders' liability under the statutes of the State of New York. The Supreme Court holds it to have been the duty of the Florida Circuit Court in construing that statute to follow the decisions upon that statute of the Courts of the State of New York. It is true that the case does not take the advanced position afterwards taken in *Huntington vs. Attrill*, but seems to make the right of enforcement in Florida depend upon the question of whether the statute is penal or contractual in nature. To that extent it must be deemed overruled by *Huntington vs. Attrill*. But it still remains one of many authorities upon the general proposition in reference to the construction of State Constitutions and statutes by State Courts and the consequent duty of the Federal Court to follow such construction. It is particularly in point because it relates to a stockholder's liability, and the manner of and the prerequisites to its enforcement.

For the most recent case in the Supreme Court reiterating this rule, see

*The California Irrigation cases*, 164 U. S., 112.

The decisions of the State courts of the *forum* are not controlling on a question of this nature.

*Huntington vs. Attrill*, cited *supra*.
*Bauserman vs. Blount*, 147 U. S., 647.

Indeed, force and effect are given to the rule in the State Courts. For instance, in Massachusetts it had been decided in *Bank of North America vs. Pindge*, 154 Mass., 203, that construing the Kansas Constitution and statute according to the decisions of the State Court of Massachusetts, an action such as that in the case at bar would not lie. Thereupon, a suit was brought in which not

only the statutes of Kansas were pleaded in the declaration, but in which it was also pleaded that as interpreted by the decisions of the Supreme Court of Kansas, the liability of the defendant as a stockholder was a contractua liability, etc.

*Hancock Bank vs Ellis*, 166 Mass., 414.

The Court says :

> " The liability of the stockholders must be determined according to the law of Kansas. We now have a case where the declaration as we interpret it sets forth that according to the law of Kansas, the defendant is liable to a judgment creditor of the corporation as upon a contract which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this Court (see *Bank of North America vs. Rindge*, 154 Mass., 203), and the alleged liability of the stockholders is of a different character from that which exists in this Commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We can not take judicial notice of the statutes of Kansas, or of their interpretation by the Courts of that state. At this stage, we simply look at the case as the plaintiff presents it.
>
> " The fact that the corporation is in the hands of receivers is immaterial, because under the averments of the declaration the liability of the defendant is directly to the creditors, and the receivers could not enforce it (*Barre National Bank vs. Hingham Manuf. Co.*, 127 Mass., 563, 567, Cook, " Stock and Stockholders," Sec. 218, and cases there cited). The averments are sufficient to set forth that the defendant is such a stockholder as by the law of Kansas would be liable to the plaintiff. Judgment reversed and demurrer overruled."

Since the decision of the case at bar in the Circuit Court of Appeals the case of *Hancock National Bank vs. Ellis* was heard in the Supreme Court of Massachusetts upon the merits. Its opinion is

not yet reported in the regular reports, but will be found in 51 Northeastern Reporter, page 207. In many respects it is the most important authority which the respondent cites, because it shows that a State Court of the highest rank has completely changed its views upon the question of the liability of a Kansas stockholder.

The concluding paragraph of the opinion should be quoted here :

> " Upon the evidence introduced at the trial," (which was the Kansas decisions), " a majority of the Court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889, was intended to be a transitory action of such a nature that it might be brought in any Court of general jurisdiction over similar actions in any State or country, where service according to the laws of that State or country could be made upon the stockholder."

So in *Marshall vs. Sherman*, 148 N. Y., 9, Judge O'BRIEN is careful to say that :

> " The complaint contains no allegation as to the meaning or effect of these statutes or of the provision of the constitution quoted, under the adjudication of the Courts of Kansas. We are, therefore, obliged to construe them ourselves with the aid of such rules, and upon such principles as the Courts of this State apply in the construction of such enactments here."

It may yet be that when some pleader is fortunate enough to overcome all the technical objections that arise in the State Court when a suit of this nature is brought, even the Courts of the State of New York will give effect to the Kansas Constitution.

In the Federal Court the technical requirements of pleading and proving the Constitution or statutes and the judicial interpretation thereof by the Courts of other States have been done away with from a very early date. The Court takes judicial notice of them.

*Owings vs. Hull*, 9 Peters, 607.
*Hanley vs. Donohue*, 116 U. S., 1, 6.
*Mills vs. Green*, 159 U. S., 651.

One more case should be cited in this connection, as it is distinctly in point in considering the effect of the Kansas *judgment*.

In *Glenn vs. Liggett*, 135 U. S., 533, it was held in reference to the effect of a judgment in Virginia under certain statutes of Virginia, that the rights of the parties must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.

That case held, moreover, that the judgment in that case could only be reviewed or impeached collaterally for lack of jurisdiction or for fraud.

*(b)*

Coming, then, to consider the Kansas statutes and the decisions thereunder, we first call attention to that part of Judge SHIPMAN'S opinion in the Court below which gives their history (89):

> "The germ of the present statutes of Kansas is found in the territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed and statutory provisions in regard to the individual liability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form until the revision and codification of 1868.
>
> "The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of section 14, chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: 'The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company.' The Supreme Court of Kansas, in *Grund vs. Tucker*, 5 Kan., 70, held that 'under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863 to recover a debt due by the corporation.' The court thus anticipated the decision in *Flash vs. Conn*, regarded 'each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock,' re-

jected the idea of a proportionate liability or a *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity."

The statement of the liability was then placed in the Constitution, and in consequence was not expressly reiterated in the codification of the statutes which took place in 1868.

The question at bar was first decided in the leading case of *Howell vs. Manglesdorf*, 33 Kan., 194 :

In this case the Court is construing Section 32 of the statute, and remarks as follows :

> " It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case, the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the Court where the judgment was rendered against the corporation ; in the other, by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired."

It then shows why the summary proceeding by motion is only available where the notice is served within the State of Kansas, and concludes that :

> " This ruling does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, *it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder.*"

This case is the subject of continuous criticism on the part of our opponents. In fact all the troubles of Kansas stockholders are supposed to be derived from its decision.

The Massachusetts Court in the *Hancock National Bank* case answered most effectively the contention that the statements in the

opinion in this Kansas case are not binding because they are *dicta*. That Court says:

> "The Courts of Kansas from the nature of the question, can never directly decide that the liability of a non-resident stockholder under paragraph 1192 of the General Statutes of Kansas is one that may be enforced in any Court of general jurisdiction in any other State or country where personal service can be made upon the stockholder. Only courts of other jurisdictions can decide that question. The Courts of Kansas can only express an opinion to that effect, if they entertain it in cases before them, as one of the reasons for the judgment they render in those cases. That opinion the Supreme Court of Kansas has expressed in *Howell vs. Manglesdorf*. The other decisions cited of the Courts of last resort in Kansas tend to confirm that opinion. None is inconsistent with it."

Judge SHIPMAN's observations on this point are also pertinent:

> "It is true that this language is *obiter* in the sense that it was not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution or was not enforceable, and that, therefore, in many instances the creditors were without remedy."

We call attention to the fact that the general nature of the stockholder's liability was considered in *Howell vs. Manglesdorf*, and the Court expressly holds that "the liability to the creditors of the corporation is in the nature of a guaranty."

See, also, *Hentig vs. James*, 22 Kan., 326.

In *Abbey vs. The Dry Goods Co.*, 44 Kansas, 415. the direct point decided was that in enforcing the stockholders' liability, action *must* be against each particular stockholder, and

that it was improper to join various stockholders. The case shows that the statute was merely an endeavor to formulate the ordinary rules of law relating to this class of actions.

See, also, Kansas general statutes, 1889, Section 4087, abolishing distinctions between suits at law and in equity, and Sections 1098 and 1101 prescribing that all joint liabilities shall be considered several as well.

*(c)*

The current of authority in the Federal Circuit Court and Circuit Court of Appeals in support of enforcing the liability in Courts outside of the territorial limits of Kansas is overwhelming. The first important case was that of

*Rhodes vs. The United States National Bank*, 66 Fed. Rep., 512, decided in 1895, by the Circuit Court of Appeals for the Seventh Circuit. That was an action of the precise nature of the one at bar; namely, a suit in Illinois by a creditor of a Kansas corporation to charge a stockholder thereof with the individual liability. The Court (p. 516) cites the Constitution and statutes and follows them by citations at length from the decisions of the Supreme Court of the State of Kansas. It holds that the United States Circuit Court for the Northern District of Illinois has jurisdiction over the subject of the action, and affirms the judgment below, holding the defendant liable as a stockholder.

Soon after the decision of the above case, the case of *Mc Vikar vs. Jones*, 70 Fed. Rep., 754, was decided by Judge ALDRICH in the United States Circuit Court for the District of New Hampshire. This was a case of precisely the same nature as the one at bar. Judge ALDRICH held that an action would lie to enforce the liability in the Circuit Court for the District of New Hampshire. We refer the Court to Judge ALDRICH'S opinion for its admirable and lengthy citation of cases.

So, also, *Bank of North America vs. Rindge*, 57 Fed. Rep., 279, which was a case to enforce the same liability. It was held by Judge Ross in the Circuit Court for the District of California that the action would lie in that Circuit Court.

To the same effect is the decision in *Dexter vs. Edmands*, 89 Fed. Rep., 467. This was rendered by Judge LOWELL in Massachusetts, and contains a long and independent examination of the theories and authorities upon the subject. The learned Court

goes into it most exhaustively, particularly so because at the time he wrote the opinion the State Court of Massachusetts had not handed down its last decision in *Hancock Bank vs. Ellis.*

In addition, there are the decisions of the Circuit Court and of the Circuit Court of Appeals in the case at bar, both Judge SHIPMAN and Judge WHEELER writing exhaustive opinions.

Besides the above cases there are also

*Brown vs. Trail*, 89 Fed. Rep., 641 (Circuit Court of Maryland).

*The Mechanics' Savings Bank vs. Fidelity Co.*, 87 Fed. Rep., 113 (Circuit Court of Pennsylvania).

*Shiffer vs. Trustees of Columbia College*, 87 Fed. Rep., 166 (Circuit Court of New York).

*American Freehold Co. vs. Woodworth*, 82 Fed. Rep., 269 (Circuit Court of New York).

There is not one Federal authority to the contrary.

The authorities in the State courts we shall consider in the succeeding point.

## V.

## The authorities in the State courts are mostly in support of the respondent's position.

First of all, in this connection, we call attention again to the full and admirable opinion in the last decision of the Supreme Court of Massachusetts in *Hancock National Bank vs. Ellis.* It is too long to be quoted. This decision is particularly gratifying because the Court has been substantially converted from its first views, which were antagonistic to our contentions.

It has been held in the Supreme Court of the State of Missouri that the action would lie in the State Court of Missouri (*Guerney vs. Moore*, 131 Mo., 650). The following observations of Judge GANTT are pertinent :

> "It does not follow that because the people of this Commonwealth have restricted the liability of stockholders in corporations created by virtue of our own laws to the

amount of their stock that they will refuse to enforce in their Courts the contracts of its own citizens who voluntarily go into other States and become stockholders in corporations under their laws, which impose upon stockholders a present liability in excess of the amount of the stock taken. Such a contract is not against public policy; it contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice (pp. 673-674)."

So, also, in the Supreme Court of the State of California, it has been held that the action lies in the California state court.

*Ferguson vs. Sherman*, 116 Cal., 169.

The Court takes a very broad view of the liability, and holds that a stockholder in a street-railway corporation is *not* within the constitutional exception relating to "railway corporations."

Only recently the highest court of the State of Michigan has adopted the same conclusion. The case is not yet reported in the regular Michigan reports.

*Western National Bank of New York vs. Lawrence*, 76 N. W. Rep., 105.

All of the authorities were reviewed in the opinion of the Court. Held that the general trend of the decisions, both in the State and Federal Courts, was in favor of enforcing the liability.

The liability has also been upheld in

*Tuttle vs. The National Bank of the Republic*, 48 Ill. Appellate Court, 481.
*Bank vs. Zinser*, 55 Ill. Appellate Court, 510.
*Marshall vs. Sherman*, 84 Hun, 186.

Counsel for the petitioner are, therefore, remitted for their authority to the highest Courts of the States of New York, Illinois and Rhode Island.

Referring first to the decision in the State Court of New York—*Marshall vs. Sherman*, 148 N. Y., 9:

The Court in this case reversed the decision of the General Term which was accompanied by an able opinion from Judge HERRICK. The case is not really in point (as stated by Judge SHIPMAN), because it refuses to take notice of the Kansas decisions. Its doctrines, moreover, are substantially in conflict with the doctrine of *Hunting-*

*ton vs. Attrill.* Indeed, its doctrines in many respects are contrary to the former decisions of the same Court, such as *Cochran vs. Wiechers*, 119 N. Y., 339, holding that a liability of this nature is contractual, and contrary to the subsequent decisions by the same Court, such as *Close vs. Potter*, 155 N. Y., 145. It is contrary to such a case as *Weeks vs. Love*, 50 N. Y., 568, and all the New York cases cited in *Flash vs. Conn*, on the point that the remedy is at law and that suit will lie against a single stockholder. All this is substantially admitted in the opinion of the learned Judge, who says :

> " It would perhaps be impossible to state the principle upon which the decision should rest without apparently coming in conflict with some of the numerous cases on the subject at some point " (p. 28).

In the case of *Stoddard vs. Lum*, 32 App. Div., 565, there is an extremely able dissenting opinion protesting against the decision of *Marshall vs. Sherman*, and showing how contrary to the general trend of authorities, even in the State of New York, that decision is.

So far as *Lowry vs. Inman*, 46 N. Y., 119, and *Christensen vs. Eno*, 106 N. Y., 97, are concerned, it is easy to distinguish the nature of the statutes involved in those cases. Both of them lack the fundamental declaration of the right which is contained in the Kansas Constitution. In *Savings Society of St. Louis vs. O'Brien*, a case decided in 1889 by the General Term of the Supreme Court, and reported in 3 N. Y. Supp., 764, statutes of this nature are sufficiently distinguished. The law, as stated in this latter case, would be applicable to the instance of the Kansas Constitution. And it was good law in the State Courts of New York until the decision of *Marshall vs. Sherman*. But the doctrine of all these cases is *contra* to *Huntington vs. Attrill*.

Another State Court on which counsel for the petitioner relies is that of Illinois. In the first case in any of the Courts of that State, the " Appellate Court," which is the Appellate Court of first resort, supported the right of a creditor to proceed outside the State of Kansas, (*Tuttle vs. National Bank of the Republic*, 48 Illinois Appellate Court Rep., 451). Shortly after that was decided, the Supreme Court of the State, in *Fowler vs. Lamson*, 146 Ill. 472, held that the Constitution of Kansas was self-executing, but that the two special remedies provided by the statute prevented the Constitution from executing itself

outside the limits of the State of Kansas. The character of this decision was such as to cause the Appellate Court to pass it by in *Bank vs. Zinser*, 55 Ill., Appellate Court Rep., 510. Meanwhile the *Tuttle* case had gone to the Supreme Court, and a decision was first handed down which appeared in the "National Corporation Reporter" of Chicago, 20 December, 1894 (Vol. 9, p. 316), distinguishing *Fowler vs. Lamson* on the ground that in that case the original judgment had been recovered in another State than Kansas, and affirming the decision of the Appellate Court (It is referred to in the opinion in *Bank vs. Zinser*). This decision was in some way rescinded, and eventually the Court, by a vote of four to three, held that the Constitution was *not* selfexecuting, and that therefore the liability would not be enforced (161 Ill., 497). The able dissenting opinion in that case has a valuable citation of cases. It is therefore apparent that most of the Judges in the State of Illinois before whom this question has come are of the opinion that the action will lie, and that the four Judges who have brought about the rule finally laid down in the *Tuttle* case have first changed their minds as to whether the action would lie, and then have changed their minds back again, the second time, however, giving different reasons than before their first change.

The State Court of Rhode Island in *Hancock Nat. Bank vs. Farnum* has also taken a position in opposition to the general line of authority. Its decision is based upon the theory that there was no real meeting of the mind of the stockholder with the mind of the corporation or of the creditor upon the point of this liability. Therefore the case holds that the liability is not truly contractual. There are two answers to this—first, there is practically as much of a meeting of minds in this instance as in any instance of a stockholder's liability, and if the reasoning of the Court of Rhode Island were adopted it would result in calling all stockholders' liabilities penal instead of contractual. But in the second place, the minds distinctly do meet. A stockholder in a corporation is presumed to know and understand the effects of the organic law of that corporation. That law is read into the contract of subscription for or purchase of the stock. When his mind meets with some one else's mind upon the point that he is to be a stockholder in the corporation, he is conclusively presumed to intend the consequences of his own act. One of those consequences, in the case of a stockholder in a Kansas corporation, is this individual liability.

Were there no corporation, he would be liable as a partner; that

is, as one of the principals. There being a corporation, his liability is limited by the common law to the obligation to pay for the amount of stock held by him; but by the Constitution of Kansas this is again increased by an additional liability to an amount equal to the stock held by him. These liabilities he takes upon himself by the contract of becoming a stockholder under which he contracts to share in the corporate assets and in the corporate profits, without subjecting himself to more than a limited liability for its losses. The common law is read into his agreement to become a stockholder, but no more and no less than is the Kansas Constitution read into his agreement to become a stockholder in a Kansas corporation.

In *Ferguson vs. Sherman* (cited *supra)* the Court discusses this particular point at length, and makes its decision depend upon it.

We, therefore, submit that the weight of authorities in the State Courts is in line with the authorities in the Federal Courts.

## VI.

**The Statute of Frauds has nothing to do with the case.**

This point of our opponents is raised for the first time in this Court. There are several simple and conclusive answers: First, no assignment of error brings it before this Court. Second, the defense of the Statute of Frauds must always be pleaded in New York Federal or State Courts *(Crane vs. Powell*, 139 N. Y., 39*)*. Third, the liability arises out of the original contract relation of the stockholder, and not out of any independent contract with the creditor to guarantee the payments of the debts of the corporation.

## VII.

**Recovery has been sanctioned also by Section 44 of the Kansas statute.**

Our learned opponents would not have made the technical point relative to the pleading were they in the courts below. It is well settled by New York practice that where a defendant has answered any judgment may be given which is warranted by the allegations of the complaint irrespective of the relief demanded in the complaint (Code Civ. Pro., Section 1207; *Underhill vs. R. R. Co.*, 21 Civ. Pro. Rep., 441, and cases there cited). It is also well settled that where a complaint states ambiguously two causes of action the defendant's proper course is to make the complaint more definite and certain, otherwise the point is waived *(Commercial Bank vs. Pfeiffer*, 108 N. Y., 242*)*.

This particular section of the Kansas statute seems to us to cover the case where it would be "nugatory or impossible" to require the entry of a judgment and the issuance and return of an execution (see the observations of Judge WOOD in *Flash vs. Conn* at p. 380). The statute therefore dispenses with this requirement, and provides that, when a corporation has suspended business for more than a year, action may be brought against the stockholders on the original debt and without joinder of the corporation. The only special *remedy* in this latter statute does not relate to the action against the stockholder, but relates to the action which the stockholder who has satisfied his liability may have on that account for contribution against his brother stockholders. He "may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable," and if he obtains judgment he may have a peculiar and flexible execution. Obviously there is nothing in the statute which would limit his right to sue for contribution elsewhere than in Kansas, the statute merely intending to enact that if he does sue for contribution in Kansas he may have this peculiar remedy by execution. What proceedings, however, he may take for contribution certainly can have no effect in limiting the right to proceed against him for the original recovery. The very fact that contribution is contemplated shows that the Legislature had in mind an absolute liability on his part to the creditor. The burden is put upon the stockholder to

seek contribution, and not upon the creditor by only permitting him to obtain from one stockholder his proportionate share. In the case at bar it will be noticed that we are within the conditions precedent stated in this statute for a suit against a stockholder. The corporation has suspended business for more than a year prior to the institution of this action, and we have proved the original obligations which were debts unpaid at the time of its suspension.

The petitioner has precisely the same right to sue his co-stockholders for contribution that he would have had if he had been sued in Kansas instead of in New York. He loses no rights and suffers no harm by being sued in one jurisdiction rather than another.

## VIII.

## The Point of Expediency is Not Against the Respondent.

In response to the observations in the brief for the petitioner under this heading, it is proper to call attention to the fact that the petitioner in this case owned one-half the stock in the bank and was one of its directors. Under those circumstances it was most obviously his duty to " meddle in the affairs of his company, or keep himself informed as to what was going on." We fail to see any hardship in imposing that responsibility upon him. The liability does not apply to stockholders in railway corporations, which is the instance of a large corporation with scattered shareholders, and where there might well be some hardship in case of insolvency if they were personally made liable.

The second point of expediency advanced seems to be against the petitioner. Is it not more expedient that the few State Courts whose decisions are in favor of the petitioner should rather conform their views to the other State Courts whose decisions are in favor of the respondent, than that the entire Federal Judiciary should overturn its former decisions? This matter came first before the Federal Courts. The decisions of the three State Courts of Illinois, New York and Rhode Island are in distinct opposition to *prior* authorities.

## IX.

### The Assignments of Error.

The first three assignments of error relate to the competency of the proof relative to the change of name of the corporation. Judge SHIPMAN disposes of this point at the conclusion of his opinion (95). The petitioner's counsel have not discussed this question in their brief in this court.

The fourth, fifth and sixth assignments of error bring up the materiality of the proof of the original indebtedness. Either this proof was material, or else it was surplusage. In either event the petitioner could not object to its introduction.

The seventh assignment of error related to the proof by which we showed that the assignee of the corporation had nothing in his hands. It is true that this was surplusage.

> Thompson on Liability of Stockholders, Section 320, and cases there cited.
> *Hancock National Bank vs. Ellis*, 166 Mass., 414,

But if surplusage, assuredly the petitioner was not harmed by it.

The other assignments of error bring up the questions heretofore discussed. One of them possibly involves the regularity of the Kansas judgment. The point as to this is not urged on the brief of counsel in this court. It was disposed of by Judge SHIPMAN in the Circuit Court of Appeals (95).

## X.

### The analogy to the case of stockholders in the national banks.

We distinctly take issue with our learned opponents in their attempts to distinguish the Kansas Constitution and statutes from the provisions of the National Banking Act and the provisions of the act of the State of New York. The wording of the Kansas Constitution is almost precisely the same as the declaration in the Na-

tional Banking Act, that stockholders "shall be held individually responsible for all contracts," etc., "to the extent," etc. Almost the same words are used in the New York act, namely, "individually liable for all debts and contracts," etc.

The cases of *Richmond vs. Irons*, 121 U. S., 27, and *Wiles vs. Suydam*, 64 N. Y., 173, and the various other New York cases cited in *Flash vs. Conn*, are, in our opinion, direct authorities in our favor upon this point. See also Morawetz, Sections 872-877.

It is true that intending stockholders in national banks usually are actually mindful of the individual liability. This arises from the fact that the statutes of Congress are better known. But it goes without saying that the mere failure to have in mind the possible consequence of becoming a stockholder in a Kansas corporation should not produce any different legal result, even if it evokes sympathy. Indeed, it is decidedly questionable whether—in view of the well known fact that statutory liability of stockholders exists in some form in most if not all of the States—any reasonably intelligent person can become a stockholder in any corporation without inquiring whether he will become liable for the debts of the corporation, and if so, under what circumstances. Failure to make such inquiry is the grossest kind of negligence. Certainly, where the people of a State have explicitly provided for such liability by a Constitutional provision, they have served notice upon all mankind in as public a manner as human ingenuity can devise. No intelligent man buying or subscribing for stock in a Kansas corporation can with any propriety plead ignorance of the Kansas Constitution.

## XI.

**The decision of the Circuit Court of Appeals should be affirmed.**

WILLIAM B. HORNBLOWER,
HOWARD A. TAYLOR,
Of Counsel.

No. 182. 27.

FEB 24 1899

# Supreme Court of the United States.

Sup. Ct. of Hornblower & Taylor for Resp't.

GEORGE L. WHITMAN,
Petitioner,

AGAINST

THE NATIONAL BANK OF OXFORD,
Respondent.

October Term, 1898.
No. 182.

Filed Feb. 24, 1899.

## Supplemental Brief for Respondent.

Since the filing of the original brief in behalf of the respondent the decision of *Bell vs. Farwell* has been reported. This was a case decided December 21st last by the Supreme Court of the State of Illinois. It will be found in 52 N. E. Rep., page 346. The Supreme Court of the State of Illinois was the first court to take a position adverse to the views of the respondent. The trend of its decisions is discussed at pages 31 and 32 of our brief.

This Court has now squarely held upon demurrer that the liability is enforceable outside of the territorial limits of Kansas. The decision is precisely in line with the decision in *Hancock Bank vs. Ellis* when that first came before the Supreme Court of Massachusetts on demurrer. Doubtless the case of *Bell vs. Farwell* will reach the same final result. The Court, moreover, expresses its opinion that the liability can even be enforced in Illinois in case of insolvency of a corporation, without a precedent judgment against the corporation, under the alternative section of the statute. Its views are particularly instructive in this respect.

The following extracts from the opinion are of interest :

> " The statute in question is neither a criminal nor a penal law. There is no ground for holding that the liability imposed by the constitution and statute of Kansas is penal in its nature or purpose.
>
> * * * * * * *
>
> " Nor does the act in question undertake to provide any form of action whatever. It merely provides that suits may

be brought against any persons who are stockholders, without undertaking to determine the character or kind of action that shall be brought. It is true, the liability of the stockholder to the creditors is one imposed by statute; but at the same time the liability is one arising out of contract. Where the charter of the corporation provides that the stockholder shall be liable to creditors individually, as was the case here, all persons who became stockholders agreed to become liable to all who might give credit to the corporation. The stockholders offer to the public to be liable as a corporation to the extent of the capital invested in the corporation, and they agree to become liable individually to an amount specified in the act of incorporation. Persons who give credit to the corporation do so upon the faith of the personal liability of the stockholders, and upon what principle can it be said that the liability is not contractual? In the discussion of this question Morawetz on Private Corporations (Section 870) says: 'If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in their corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable, in their corporate capacity, to the extent of the capital which they have agreed to contribute for the purpose of carrying on the Company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation, contract upon the faith of this liability held out as their security and the offer of the shareholders, being thereby accepted, ripens into a binding contract.'"

WILLIAM B. HORNBLOWER,
HOWARD A. TAYLOR,
Of Counsel.

# WHITMAN *v.* OXFORD NATIONAL BANK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 27. Argued March 8, 9, 1899. — Decided March 5, 1900.

The liability imposed upon stockholders in corporations by the provision in the constitution of the State of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes" and by the statutes of that State which are referred to in the opinion of the court in this case, though statutory in origin, is contractual in its nature; and an action on this liability, not being one to enforce a penal statute of Kansas, but only to secure a private remedy, can be maintained in any court of competent jurisdiction, whether Federal or state.

THIS was an action brought in the Circuit Court of the United States for the Southern District of New York, by the National Bank of Oxford, a national banking association, incorporated and established under the laws of the United States, and doing business at Oxford in the State of Pennsylvania, against George L. Whitman, a citizen of the State of New York, asserting his liability, under the provisions of the constitution and laws of the State of Kansas, for a debt of more than $2000 due to the plaintiff from the Arkansas City Investment Company, a corporation of the State of Kansas, in which the defendant was a stockholder.

Statement of the Case.

The constitution of the State of Kansas of 1859 provided, in article 12, section 2, as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The General Statutes of 1868 of that State, chapter 23, contained the following provisions:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 40 (as amended in 1883). Laws 1883, c. 46, p. 88. A corporation is dissolved — first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"Sec. 44. If any corporation, created under this or any general statute of this State, except railway or charitable or relig-

ious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The complaint alleged, and the plaintiff at the trial introduced evidence of, the following facts: The Kansas corporation was duly formed under the general laws of the State of Kansas in 1886, for the purpose of a general banking and real estate business; had its only place of business at Arkansas City in that State; was not a railway, religious or charitable corporation; and had a capital of $200,000, divided into 2000 shares of $100 each, of which the defendant, from the time of the formation of the corporation, and ever after, owned one half. In December, 1890, that corporation made a general assignment for the benefit of its creditors, and from that time wholly suspended business. About four months before its failure, it indorsed and guaranteed for value two promissory notes, together amounting to $4875, which were discounted by the plaintiff. In 1895 the plaintiff brought an action to recover the unpaid balance of those notes, in a district court of the county of Cowley and State of Kansas, against the corporation, and, after its general appearance and subsequent default, recovered judgment against it for the sum of $3449; an execution thereon against the corporation was issued to the sheriff of the county, who returned it wholly unsatisfied, because he could not find any property on which to make a

levy; and the corporation had in fact no assets of any kind.

The defendant moved the Circuit Court of the United States to direct a verdict in his favor, upon the ground that it had no jurisdiction to enforce a statutory remedy of the State of Kansas. The court denied the motion, directed a verdict for the plaintiff, overruled a motion for a new trial, and entered a final judgment for the plaintiff. 76 Fed. Rep. 697. That judgment was affirmed by the Circuit Court of Appeals. 51 U. S. App. 536. The defendant thereupon applied for and obtained this writ of certiorari. 168 U. S. 710.

*Mr. William G. Choate* for Whitman. *Mr. Joseph H. Choate* and *Mr. William G. Wilson* were on his brief.

*Mr. William B. Hornblower* and *Mr. Howard A. Taylor* for the Oxford Bank.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

By section 1 of Article 12 of the constitution of Kansas a certain definite liability is cast upon each stockholder in other than railway, religious and charitable corporations. This liability is for the dues of the corporation and to an amount equal to the stock owned by him. The word "dues" is one of general significance, and includes all contractual obligations. Whether broad enough to include liabilities for torts, either before or after judgment, is not a question before us, and upon it we express no opinion. The words, "shall be secured," are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the constitution is self-executing. *Willis* v. *Mabon*, 48 Minnesota, 140. The discretion of the legislature extends beyond this, as indicated by the clause "and such other means as shall be provided by law." A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature

prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision. "The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." Lamar, Justice, in *Lake County* v. *Rollins*, 130 U. S. 662, 671.

But this constitutional provision does not stand alone. The legislature of Kansas has acted on the subject-matter, and the constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other.

In section 32 of chapter 23 of the General Statutes of that State, passed before the organization of the corporation referred to, the legislature prescribed the mode of enforcing this constitutional liability, and if such were needed declared to what extent it could be enforced. It may be either by motion in a case in which judgment has been rendered against the corporation and execution thereon returned unsatisfied, or by a direct action by the plaintiff in such judgment. Neither remedy can be made effectual in the courts of Kansas against a stockholder unless by due service of process he is brought within the jurisdiction of such courts. *Wilson* v. *Seligman*, 144 U. S. 41; *Howell* v. *Manglesdorf*, 33 Kansas, 194, 199.

Whatever else may be said about the remedy it is direct, certain and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations. In view of the present tendency to carry on business through corporate instrumentalities and the freedom from personal liability which attends ordinary corporate action, it cannot be said that this limited additional remedy is open to judicial condemnation.

The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a part-

nership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute.

*Flash* v. *Conn*, 109 U. S. 371, is much in point. In that case a corporation was organized in the State of New York, under an act of legislature, which contained this provision:

"SEC. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

An action was brought in Florida against one of the stockholders, and on error to this court it was held that the stockholder was liable, the court saying (p. 377):

"We think the liability imposed by section 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded."

And again, after noticing the rulings of the Court of Appeals of the State of New York (p. 379):

"If this were a case arising in the State of New York we should therefore follow the construction put upon the statute by the courts of that State. The circumstance that the case comes here from the State of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty.

"The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. *Dennick* v. *Railroad Co.*, 103 U. S. 11."

And finally, in reference to the objection that the action was one at law against a single stockholder instead of in equity against all (p. 380):

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York, under section 10 of the statute relied on in this case. *Shillington* v. *Howland*, 53 N. Y. 371; *Weeks* v. *Suydam*, 64 N. Y. 173; *Handy* v. *Draper*, 89 N. Y. 334; *Rocky Mountain Nat. Bank* v. *Bliss*, 89 N. Y. 338."

In *Richmond* v. *Irons*, 121 U. S. 27, in which the question presented was whether the individual liability of a stockholder in a national bank survived as against his administrator, it was said (p. 55):

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily

entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising under these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

In *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372, in which one national bank was sought to be charged as stockholder in another national bank, was this declaration:

"In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory."

"Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Similar are the views entertained by the Supreme Court of Kansas.

In *Abbey* v. *Dry Goods Co.*, 44 Kansas, 415, 418, we find this statement:

"The nature of this liability is peculiar; it seems to have been created for the exclusive benefit of corporate creditors; the liability rests upon the stockholders of a corporation to respond to the creditors, for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves, in their own right and for their own benefit."

And again, in *Plumb* v. *Bank of Enterprise*, 48 Kansas, 484, 486:

"Under our constitution and statutes, the individual liability stands as a sort of surety for the corporate liability, and creditors of the corporation are supposed to contract with reference to the individual responsibility of the stockholders."

Opinion of the Court.

In *Achenbach* v. *Pomeroy Coal Co.*, 2 Kansas Ct. App. 357, 359, is this language:

"The liability of a stockholder in an insolvent corporation is of the nature of a liability on contract, and survives against the legal representatives of a deceased stockholder."

And while the word "statutory" is sometimes found in the opinions of that court as descriptive of the stockholder's liability, evidently the word is so used to indicate the origin rather than the nature of the liability. Thus, in *Howell* v. *Manglesdorf*, 33 Kansas, 194, it was said (p. 199):

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Obviously this recognizes the contractual nature of the obligation as well as its statutory origin. Again, in *Pierce* v. *Security Company*, 60 Kansas, 164, it was held that a stockholder, sued by a judgment creditor of the corporation, might set off against that claim the indebtedness of the corporation to him, accruing before he became liable as stockholder, the court saying (p. 166):

"Where the statute creates a liability against stockholders which is personal and several, and actionable by any creditor against any stockholder, it is generally held that a stockholder may in such a proceeding brought against himself set off debts due to him from the company."

Thus, while the statutory origin of the obligation is asserted, its contractual nature is recognized in that the right of set-off is affirmed.

That an action upon this liability is not one to enforce a penal statute of Kansas but only to secure a private remedy is not open to question since the decision in *Huntington* v. *Attrill*, 146 U. S. 657.

And as this liability is one which is contractual in its nature, it is also clear that an action therefor can be maintained in any court of competent jurisdiction. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Huntington* v. *Attrill*, 146 U. S. 657.

Syllabus.

Similar views have been expressed by the highest courts of several States in like actions based upon the same Kansas constitutional and statutory provisions. *Ferguson* v. *Sherman*, 116 California, 169; *Bell* v. *Farwell*, 176 Illinois, 489; *Hancock National Bank* v. *Ellis*, 172 Mass. 39; *Western National Bank* v. *Lawrence*, 117 Michigan, 669; *Guerney* v. *Moore*, 131 Missouri, 650. See also *Paine* v. *Stewart*, 33 Connecticut, 516; *Cushing* v. *Perot*, 175 Penn. St. 66; *Rhodes* v. *United States National Bank*, (U. S. Ct. Ap. 7th Cir.) 24 U. S. App. 607; *Bank of North America* v. *Rindge*, (U. S. Cir. Ct. S. Dist. Cal.) 57 Fed. Rep. 279; *McVickar* v. *Jones*, (Cir. Ct. Dist. N. H.) 70 Fed. Rep. 754; *Mechanics' Savings Bank* v. *Fidelity Insurance Company*, (Cir. Ct. E. Dist. Penn.) 87 Fed. Rep. 113; *Dexter* v. *Edmands*, (Cir. Ct. Mass.) 89 Fed. Rep. 467; *Brown* v. *Trail*, (Cir. Ct. Dist. Md.) 89 Fed. Rep. 641.

We see no error in the judgment of the Circuit Court of Appeals, and it is, therefore,

*Affirmed.*

Mr. Justice Peckham dissented.